STATE OF MICHIGAN
IN THE SUPREME COURT

LULA ELEZOVIC,

Plaintiff-Appellant

and

JOSEPH ELEZOVIC,

Plaintiff,

-vs-

FORD MOTOR COMPANY and
DANIEL P. BENNETT,

Defendant-Appellees.

Supreme Court Case No. 125166
Court of Appeals No. 236749
Wayne Cir Ct No. 99-934515-NO

BRIEF ON BEHALF OF THE AMICI CURIAE MICHIGAN CONFERENCE OF THE NATIONAL ORGANIZATION FOR WOMEN (NOW), JUSTINE MALDONADO, MILISSA McCLEMENTS, AND PAMELA PEREZ

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STATEMENT OF INTEREST OF AMICI CURIAE

The Michigan Conference of the National Organization for Women (Michigan NOW) is an organization devoted to the achievement of social, political, and economic equality for women. Michigan NOW is a state affiliate of the National Organization for Women (NOW), the largest women's rights organization in the United States, with a membership of more than 500,000 women and men in local chapters throughout the nation.

This case presents issues of major importance to Michigan jurisprudence as a whole and of special importance to Michigan NOW. At stake is the continuing viability of the protection against sexual harassment provided by the Elliott-Larsen Civil Rights Act (ELCRA).

The three individual amici curiae identified in the caption of this brief—Justine Maldonado, Milissa McClements, and Pamela Perez—are victims of sexual harassment by Daniel Bennett, the individual defendant in this case. Like plaintiff Elezovic, each of them worked at the Wixom Assembly Plant and each brought suit against Bennett and against Ford Motor Company for its failure to remedy the discrimination to which they were subjected.

Each has a direct interest in these proceedings, not only because each was subjected to sexual harassment by the same man at the same plant, but because each case includes issues substantially similar to the ones present in this case—and because the decision in this case will therefore have a significant effect on each of their cases.

The essential facts supporting Maldonado's and McClements' interest in this case are set forth in decisions by the Court of Appeals and in the applications for leave to

appeal filed by Ford in this Court. *Maldonado v Ford and Bennett*, unpublished opinion of Court of Appeals, Ct App No 243763, *app lv pending* Sup Ct No. 126274 (copy of Court of Appeals Opinion attached as Ex A); *McClements v Ford and Bennett*, Ct App No 243764, *app lv pending* Sup Ct No. 126276 (copy of Court of Appeals Opinion attached as Ex B). The essential facts supporting Perez's interest in this case are set forth in a decision by the Wayne County Circuit Court that is now pending on an appeal of right in the Court of Appeals. *Perez v Ford and Bennett*, Wayne County Cir Ct No. 01-134649-CL, *appeal pending* Ct of App No. 249737 (copy of Wayne Circuit Court Opinion attached as Exhibit C).

As set forth in the Court of Appeals Opinion in her case (Ex A), in early 1998, Bennett twice exposed his penis to Maldonado while on the grounds of the Wixom plant, demanding sex on both occasions. He thereafter stalked Maldonado in the plant and some months later followed her as she drove home, on that occasion again demanding sex and again exposing his penis to her (Ex A, at 1-2). Maldonado filed repeated reports with Ford's supervisors and managers, but nothing was done about this harassment. Maldonado has a direct interest in this Court's resolution of two issues present in this case: (1) the exclusion of evidence that Ford knew of and did nothing about Bennett's work-related sexual harassment of high school girls, where the Court of Appeals adopted the holding of the Court of Appeals in this case, and (2) the relevance and significance of Bennett's harassment of other employees, an issue present in this case and in her case (Ex A, at 7-9).

As set forth in the Court of Appeals Opinion in McClements' case (Ex B), in late 1998, when McClements was employed by a Ford subcontractor in the Ford Wixom

cafeteria, Bennett approached her from behind, grabbed her, spun her around, and forced his tongue into her mouth on same two occasions in the cafeteria at the Wixom plant. She has a direct interest in the resolution of the same two issues regarding the relevance and significance of Ford's failure to investigate or remedy Bennett's prior acts of sexual harassment. In her case, those issues are presented in the context of both a common law negligent retention claim and a claim under the Elliott-Larsen Act (Ex B, at 3-4).

Finally, as set forth in the opinion of the Wayne County Circuit Court, in late summer 1999, when Perez was in Bennett's office at the Wixom plant on a business assignment, Bennett offered her money to go to a hotel and have sex. When Perez refused, Bennett exposed his erect penis to her, stroked it, and told her to "take care of me now" and keep the money (Ex C, at 2). She has a direct interest in the resolution of the two issues already identified. In addition, she has a direct interest in the question of whether she may pursue her claim under the Elliott-Larsen Act against Bennett individually.

STATEMENT OF JURISDICTION

The amici curiae accept the Statement of Jurisdiction filed by the plaintiff-appellant.

STATEMENT OF QUESTIONS INVOLVED

I. DID THE COURT OF APPEALS ERR AS A MATTER OF LAW IN CONCLUDING THAT THE PLAINTIFF COULD NOT BRING AN ACTION UNDER THE ELLIOTT-LARSEN ACT, MCL 37.2101, ET. SEQ. AGAINST THE INDIVIDUAL SUPERVISOR WHO SEXUALLY HARASSED HER?

The plaintiff-appellant answers "Yes."

The amici curiae answer "Yes."

The Court of Appeals answered "No."

The defendant-appellees answer "No."

II. DID THE COURT OF APPEALS ERR AS A MATTER OF LAW IN CONCLUDING THAT FORD MOTOR COMPANY COULD NOT BE HELD RESPONSIBLE FOR THE SEXUAL HARASSMENT PERPETRATED BY THE DEFENDANT BENNETT UPON THE PLAINTIFF DURING THE COURSE OF HER EMPLOYMENT AT THE WIXOM ASSEMBLY PLANT?

The plaintiff-appellant answers "Yes."

The amici curiae answer "Yes."

The Court of Appeals answered "No."

The defendant-appellees answer "No."

III. DID THE COURT OF APPEALS ERR AS A MATTER OF LAW IN CONCLUDING THAT NOTICE BY A CO-WORKER WAS INSUFFICIENT TO PUT FORD ON NOTICE THAT THERE WAS A SUBSTANTIAL PROBABILITY THAT ITS SUPERVISOR WAS SEXUALLY HARASSING EMPLOYEES UNDER HIS SUPERVISION AT THE WIXOM ASSEMBLY PLANT?

The plaintiff-appellant answers "Yes."

The amici curiae answer "Yes."

The defendant-appellees answer "No."

IV. DID THE COURT OF APPEALS ERR AS A MATTER OF LAW IN AFFIRMING THE EXCLUSION OF EVIDENCE THAT DEMONSTRATED THAT FORD WAS AWARE OF AND DID NOTHING ABOUT SERIOUS SEXUAL HARASSMENT PERPETRATED BY THE DEFENDANT DANIEL BENNETT AT A TIME WHEN HE WAS OPERATING FORD'S VEHICLE AS PART OF HIS DUTIES AT THE WIXOM ASSEMBLY PLANT?

The plaintiff-appellant answers "Yes."

The amici curiae answer "Yes."

The Court of Appeals answered "No."

The defendant-appellees answer "No."

V. DID THE COURT OF APPEALS ERR AS A MATTER OF LAW IN HOLDING THAT NOTICE OF SEXUAL HARASSMENT IS ONLY EFFECTIVE IF IT IS CONVEYED TO A HIGH MANAGEMENT OFFICIAL?

The plaintiff-appellant answers "Yes."

The amici curiae answer "Yes."

The Court of Appeals answered "No."

The defendant-appellees answer "No."

VI. DID THE COURT OF APPEALS ERR AS A MATTER OF LAW IN HOLDING THAT NOTICE OF SEXUAL HARASSMENT IS INEFFECTIVE AS A MATTER OF LAW IF THE EMPLOYEE VICTIMIZED BY THAT HARASSMENT ASKED THAT HER COMPLAINT BE KEPT CONFIDENTIAL?

The plaintiff-appellant answers "Yes."

The amici curiae answer "Yes."

The Court of Appeals answered "No."

The defendant-appellees answer "No."

STATEMENT OF FACTS

The amici accept the Statement of Facts in the Brief filed by the appellant Lula Elezovic.

SUMMARY OF ARGUMENT

The amici curiae assert that the Court of Appeals panel correctly recognized that the prior decisions of the Court of Appeals were in error and that the plaintiff employee, who was victimized by sexual harassment, had the right to bring an action under the Elliott-Larsen Act, MCL 37.2101, et. seq., against the defendant Daniel Bennett, the supervisor who harassed her. The Court of Appeals panel correctly recognized that the clear wording of the statute so provides, especially when interpreted, as it must be, in light of the common law remedies that it was intended to expand. The amici curiae further assert that the Act should be interpreted to provide such a right of action in order to further the broad remedial purposes for which the statute was enacted.

The Court of Appeals erred as a matter of law in affirming the trial court's decision granting Ford's motion for a directed verdict on plaintiff's claim against Ford under the same Act. In finding that Ford did not, as a matter of law, have notice that there was a "substantial probability" that sexual harassment was occurring, the Court of Appeals improperly departed from this Court's holding in *Chambers v Trettco*, 463 Mich 297 (2000) that the jury must determine whether Ford had notice based upon the jury's assessment of the "totality of circumstances" known to the company.

The Court of Appeals also erred by ruling that the explicit notice provided to Ford by a coworker that Bennett was perpetrating repeated acts of sexual harassment upon her did not, as a matter of law, put Ford on notice that there was a substantial probability that

Bennett was perpetrating sexual harassment in the Wixom plant. In so ruling, the Court of Appeals departed from Chambers, from the common law of agency on which it was based, and from the unanimous precedents of the federal courts under Title VII.

For similar reasons, the Court of Appeals erred as a matter of law by ruling that Ford had no notice of the danger of sexual harassment that Bennett posed when the Wixom Police informed Ford that Bennett had used a Ford vehicle entrusted to him for evaluation to expose himself to teenagers on the public highways. If sexual harassment is to be ended, companies should not be allowed under the Act to ignore notice of conduct so severe that it was a crime under the laws of the State of Michigan.

The Court of Appeals also erred by holding that the explicit notice of sexual harassment that the plaintiff provided to her supervisors was not sufficient to require Ford to investigate because the supervisors were not high management officials and because the plaintiff asked her supervisors to keep the matter in confidence because she feared retaliation.

In sum, the Court of Appeals has adopted standards for finding respondeat superior liability that depart from this Court's decision in *Chambers* in ways that will allow employers to do nothing even to investigate complaints of sexual harassment. If not reversed by this Court, the standards adopted by the Court of Appeals will prevent the Elliott-Larsen Act from achieving its aim of eradicating sexual harassment in the workplaces of the State..

ARGUMENT

I

THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN AFFIRMING THE TRIAL COURT'S DECISION GRANTING THE DEFENDANT DANIEL BENNETT'S MOTION FOR A DIRECTED VERDICT.

A. The *Elezovic* panel properly declared that the plaintiff had a claim under the Elliott-Larsen Act against the supervisor who had sexually harassed her.

In *Eide v Kelsey Hayes*, 431 Mich 26, 35 (1988), this Court, speaking through Justice Patricia Boyle, described the Elliott-Larsen Act as a "comprehensive" remedial statute of "manifest breadth" that should be liberally construed in aid of its purpose of ending sexual harassment in the workplaces of the state.

In the instant case, however, the trial court held that Elezovic had no claim against either Daniel Bennett, the man who harassed her, or her employer, Ford Motor Company, even though Elezovic had testified to a terrifying five-year campaign of sexual harassment by Bennett that included assaults, stalking, exposure, and numerous degrading and intimidating sexual comments.

In affirming that ruling, the Court of Appeals departed from the Act in two interrelated ways. First, under compulsion of the Administrative Order, the *Elezovic* panel was required to affirm the dismissal of Elezovic's claim against the defendant Bennett even though the panel believed that holding to be in error. *Elezovic v Ford*, 259 Mich App 187, 197-203 (2004), disagreeing with *Jager v Nationwide Truck Brokers, Inc.*, 252 Mich 464 (2002), *lv den* 468Mich 884 (2003). Second, the *Elezovic* panel dismissed the plaintiff's claim against Ford based upon a standard for respondeat superior liability that is far higher than the Act requires or allows.

Taken together, the two holdings have sharply weakened the protection afforded by the Act by making it far harder to sue employers – and by eliminating altogether the right to sue individual tortfeasors. These rulings threaten to leave victims of workplace sexual harassment – including, as in *Elezovic*'s case, egregious sexual abuse – without any cause of action under the Act that was designed to eradicate harassment and abuse.

Beginning with the first error – the elimination of individual liability for supervisors who perpetrate sexual harassment upon employees – it clearly presents a question of law that this Court reviews de novo. *Bertrand v Alan Ford, Inc.,* 449 Mich 606, 617-618 (1995). In analyzing that question, the *Elezovic* majority correctly started with the language of the statute itself. The Act defines an employer as a "...a person who has 1 or more employees...and *includes an agent of that person.*" *Id.*, at , citing MCL 37.2201(a)(emphasis added). Substituting that definition into the Act's general prohibition of discrimination, the Act provides that "[An agent of an employer] shall not ...discriminate against an individual with respect to employment...or a term, condition, or privilege of employment, because of ... sex...." M.C.L s 37.2202(1)(a). As discrimination on account of sex is defined to include sexual harassment, the Act thus specifically provides that "[An agent of an employer] shall not" .... "subject the employee to unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature" under the three conditions defined by statute. MCL 37.2103(h).

Under the remedial section of the statute, "A person alleging a violation of this Act may bring a civil action for appropriate injunctive relief or damages, or both." MCL 37.2801(1). As Bennett was without question an agent of an employer and as there is

similarly no question that his acts constituted a violation of the Act's ban on sexual harassment, Elezovic is a "person alleging a violation of this Act" and she may accordingly bring a civil action against Bennett for appropriate injunctive relief, or damages, or both.

The clear wording of the statute is, by itself, sufficient grounds for this Court to reverse the Court of Appeals decision that a woman employee has no claim under the Act against the man who sexually harassed her.[1] But the *Elezovic* panel also correctly recognized that reversal was even more urgent when the words of the statute were interpreted, as they must be, against the background of the common law. As the *Elezovic* panel held:

> Common law agency principles are in keeping with this language. Under agency principles, an agent is generally liable to a third person for misfeasance and for his own tortuous acts. See Michigan Pleading and Practice, Agency, s 104, p 366; *Warren Tool Co v Stephenson*, 11 Mich App 274, 300 (1968).
>
> *Elezovic*, 259 Mich App at 199-200.

In declaring that tort principles should govern the construction of the Act, the *Elezovic* panel is clearly correct. Both state and federal courts have routinely recognized that civil actions to combat racial or other forms of discrimination are "in the nature of a tort action..." *McCalla v Ellis*, 129 Mich App 452, 462 (1983); *Demery v City of Youngstown*, 818 F 2d 1287 (CA 6 1987)(personal injury statute of limits, not contract statute, applies in claim under 42 USC 1981). Indeed, in *Eide*, this Court recognized that

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[1] In this brief, the amici have phrased the argument as a woman's right to bring an action against the man who harassed her, both because that is the claim here and because it is the most frequent claim under the Act. The Elliott-Larsen Act is, however, gender neutral and a male employee could bring an action against a male or female supervisor who harassed him on account of his sex. To avoid the repeated use of alternative pronouns, the amici have adopted in this brief the convention of using the pronouns appropriate for a woman employee bringing an action against a male supervisor.

Elliott-Larsen plaintiffs had always been able to recover the damages traditionally available in tort actions. *Eide*, 431 Mich at 36.

In enacting the Elliott-Larsen Act, the Legislature knew that an agent of an employer was personally liable for any injuries that he inflicted by negligent or intentional misconduct during the course of his employment. In creating a "damages" remedy against "employers," including their agents, the Legislature clearly created a cause of action in which the company could be held liable for acts where respondeat superior applied and the agent could be held liable in all cases for the acts that he personally committed.

There is no reason that Bennett should be liable under a claim for assault and battery or intentional infliction of mental distress, but not liable for a claim under the Elliott-Larsen Act. In fact, if anything, he should be more clearly responsible under the Act because it is a "comprehensive" remedial statute of "manifest breadth" designed to expand the rights and remedies available at common law. *Eide*, 431 Mich at 35.

As the *Jager* court recognized, for almost a quarter century, Michigan has interpreted the Act to provide a remedy against the individual harasser. *Jager*, 252 Mich App at 478-479, citing, *inter alia*, *Jenkins v Southeastern Michigan Chapter, American Red Cross*, 141 Mich App 785 (1985) and *Munford v James T. Barnes & Co*, 441 F Supp 459 (ED Mich 1977). The Legislature has made no attempt to change that law. Moreover, until *Jager*, there was no decision suggesting that the established precedent should be changed.

As the statute's words, purpose and history and the common law *all* support the right of a woman to bring a civil action against a supervisor who harassed her, the

Elezovic panel rightly concluded that the *Jager* panel had erroneously changed the established law by eliminating the right of a woman employee to bring an Elliott-Larsen claim against the male supervisor who had sexually harassed her.

B. The *Jager* panel wrongly ignored the common law and wrongly applied precedent under Title VII to a state act that differed substantially from Title VII.

The *Jager* panel's rationale for dismissing claims against supervisors is summed up in the following sentence:

> We believe that, like Title VII, the language in [the Act's] definition of 'employer' concerning an 'agent' of the employer was meant merely to denote respondeat superior liability rather than individual liability."
>
> *Jager*, 252 Mich App at 484.

To begin with, that sentence reveals that the *Jager* panel asked the wrong question. There is no reason to ask whether the legislative definition of employer revealed an intent to denote respondeat superior liability *rather than* individual liability. In creating a tort remedy (damages) for a tort claim, the Legislature intended to achieve both objectives: the agent would always be liable for wrongs that he committed – and his principal, the employer, would be liable under the common-law standards of respondeat superior.

In reaching a directly opposite conclusion, the *Jager* panel, as revealed in the sentence quoted above, relied heavily upon precedents decided under Title VII. As this Court has repeatedly held, however, the courts of Michigan may borrow from Title VII in interpreting the state act – but they should be extremely cautious in doing so where the language of the Elliott-Larsen Act differs from that of Title VII. *Chambers*, 463 Mich at 313.

In this case, as the *Jager* Court noted, the definitions of employer in the state and federal act are similar. Compare MCL 37.2201(a) with 42 USC 2000e(b). When the Legislature passed the Elliott-Larsen Act in 1977, however, there were few reported decisions on whether an individual supervisor could be held liable under Title VII. See *Mumford*, 441 F Supp at 466. The Legislature clearly did not intend to incorporate federal decisions that had not yet been rendered.

More fundamentally, the Legislature incorporated a similar definition of employer in the context of a statute whose entire structure differed in crucial ways from Title VII. As this Court has held, in attempting to discern the meaning of terms in a statute, the parts should be construed together in the context of the whole statute in order to arrive at a harmonious whole. *LeRoux v Secretary of State*, 465 Mich 594, 616-617 (2002). As will be seen, the definition of an employer has a very different meaning in the context of the entire state Act than it does in the overall context of Title VII.

Specifically, the Elliott-Larsen Act differs from Title VII in three ways that are crucial for the issue at hand. First, the state act applies to all employers – not merely to those with fifteen or more employees. Compare MCL 37.2201(a) with 42 USC 2000e(b). Second, from the beginning, the state Act provided for legal remedies – not merely the equitable remedies provided by Title VII as it existed before the 1991 amendments. *Eide*, 431 Mich at 37-38. Third, at no point has the Michigan Legislature enacted a provision that even hinted that individuals could not be held liable – in sharp contrast to the 1991 amendments to Title VII in which Congress placed limitations on damages based upon the size of the employer – without including any statutory provisions for damages that could be awarded against individual defendants. 42 USC 1981a(b)(3).

Thus, while the *Jager* panel was correct in declaring that the federal circuits were unanimous in holding that Title VII provided no remedy against individual supervisors, it failed to recognize that *every* one of those federal decisions was *explicitly* based upon statutory provisions that were present in Title VII – but completely absent from the Elliott-Larsen Act.

The Second Circuit's decision in *Tomka v Seiler Corp*, 66 F 3d 1295 (CA 2 1995) provides an excellent illustration of the error of the *Jager* panel. Under the literal wording of the definition of employer alone, the Second Circuit declared that an employee *should* be entitled to bring an action against an individual supervisor who had subjected her to discrimination. *Id.* at 1314. But, the Court held, it would not so interpret the Act because the definition would not bear that meaning in light of the three statutory provisions set forth above. *Id.*

In the *Tomka* Court's words, by defining employer as it did, "...Congress clearly expressed [an] intent to limit liability to employer-entities with fifteen or more employees," which, the Court said, meant that it was "inconceivable" that Congress intended to provide a remedy against individual supervisors. *Id.*, at 1314. Similarly, the Court held, because the original Act provided only for reinstatement, backpay and other equitable remedies that were "most appropriately provided by employers," Title VII had from the beginning not been intended to make individual supervisors liable because they could not provide those remedies. *Id.*, at 1314-1315. Finally, the Court held, the 1991 amendments confirmed that Congress "contemplated that only employer-entities could be held liable for compensatory and punitive damages" because those amendments specified caps on damages based upon the size of the employer – without any standards for caps on

awards against any individual defendant. *Id*, at 1315-1316.

Every federal authority relied upon by the *Jager* majority bases its holdings on one or more of these arguments – frequently interspersed with observations that without those other provisions, the literal language of Title VII would provide for actions against individuals who had harassed the plaintiff. See, e.g., *Williams v Banning*, 72 F 3d 552, 553-555 (CA 7 1995); *Grant v Lone Star Company, B.I.*, 21 F 3d 649, 651-653 (CA 5 1994), *cert den* 513 US 1015 (1994); *Sheridan v E.I. DuPont de Nemours & Co*, 100 F 3d 1061, 1077-1078 (CA 3 1996) *cert den* 521 US 1129 (1997); *Miller v Maxwell's Int'l Inc.*, 991 F 2d 583, 587-588 (CA 9 1993), *cert den sub nom Miller v LaRosa*, 510 US 1109 (1994).

The *Jager* panel does not even mention – much less discuss – the significance of Title VII's initial provision of only equitable remedies or of the damage caps in the 1991 amendments. Of the three crucial differences between the state and federal acts, the *Jager* panel only recognizes one – the absence of the fifteen employee limit in the state Act. *Jager*, 252 Mich App at 483-484.

But it wrongly minimizes that crucial difference. Even though that limit was central in every decision holding that individuals could not be sued under Title VII, the *Jager* panel claimed that the absence of any such provision in the state act was irrelevant to the liability of an individual under the state act.

> Our Legislature sought to protect all employees, not just those of employers more likely to be able to withstand the costs associated with litigating the costs associated with litigating discrimination claims under the Civil Rights Act [citation omitted] Consequently, we find that the CRA's definition of employer concerning the number of employees does not signal an intent by the Legislature to make individuals as well as employers liable under the Act.
>
> *Jager*, 252 Mich App at 483-484.

The *Jager* panel offered no reason for this interpretation of the Act—and no reason for concluding that the Legislature intended the Act to apply to sole proprietors with one employee but not to supervisors who directed hundreds and perhaps thousands of employees.

As Elezovic panel correctly concluded, there is no basis for that holding in the statutory language, in the common law, or in the federal precedents decided under Title VII.

C. The purpose of the Act would be furthered by authorizing women to bring actions under the Act against individual supervisors who perpetrated acts of sexual harassment upon them.

Even if the statutory language was ambiguous – which this language is not – this Court has held that the statute should be interpreted in light of the purpose for which it was enacted. Judged by that standard – which is not even addressed by the *Jager* panel – it is abundantly clear that the *Elezovic* panel correctly found that the plaintiff should be allowed to proceed with her action against the defendant Bennett.

To begin with, as the *Eide* court recognized – and the Act clearly provides – the Elliott-Larsen Act was designed to be a *comprehensive* remedy for all forms of employment discrimination, including sexual harassment. After the *Jager* panel's holding, however, the statute is no longer comprehensive. Instead, under *Jager*, future plaintiffs would be required to bring tort actions against supervisors who had perpetrated acts of sexual harassment upon them. *Jager*, 252 Mich App at 485 n 14.

While *Jager* did not specify the torts that it had in mind, they are presumably assault, assault and battery, and intentional infliction of mental distress. As is obvious, the courts did not develop any of those torts as a means to prevent or remedy sexual

harassment. Nor did the Legislature design the workers' compensation immunity statute that would be invoked as a defense to these tort claims in order to set standards for sexual harassment claims. MCL 418.131.

If the *Jager* holding were adopted by this Court, Michigan would have two standards – often in the same action – for deciding whether an environment was unlawfully hostile. Against the employer, the standards developed under the Elliott-Larsen Act would apply. Against the supervisor, however, the standards developed under the common law would apply. The Elliott-Larsen Act would no longer be the comprehensive remedy that this Court has declared it to be.

More importantly, it would no longer be a broad ban on sexual harassment. Cases that were actionable under the Act would not be actionable under the common-law torts. Eliminating civil-rights actions against individual supervisors would lessen the deterrent effect and make it more likely that supervisors like Bennett would continue with the unlawful harassment like that Elezovic endured. Moreover, in cases where a company is small or insolvent, eliminating a statutory action against the individual supervisor may deprive the victim of sexual harassment of the only effective remedy that she may have.

Finally, for reasons that will be discussed in the next section, many, perhaps most, women either do not report acts of sexual harassment, or else file belated and equivocal reports of those acts. Depending upon how high the bar is set for respondeat superior liability, those women may have no remedy if the court eliminates their right to bring an action against the supervisor who perpetrated that harassment.

The *Jager* panel cited no reason – and there is no reason – that the man who perpetrated sexual harassment as grotesque as that in this case should be given a free

pass. Such a free pass will not encourage women to report acts of sexual harassment to their employer, nor will it strengthen the employer's resolve to take action on those complaints that are filed. It will only convince those victimized by sexual harassment that there is nothing they can do. Put simply, if Bennett cannot be sued for what he did to Elezovic, what woman at the Wixom plant will file a complaint of sexual harassment in the future?

The *Jager* panel thus departed not only from the clear wording of the statute and the common law remedies that it provided, but also from the fundamental purpose of the statute, the elimination of conduct like that perpetrated by Bennett at the Wixom plant. If the Elliott-Larsen Act's purpose of eradicating sexual harassment is to be furthered, this Court should reverse the directed verdict granted to the defendant Bennett.

II

THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN AFFIRMING THE TRIAL COURT'S DECISION GRANTING FORD'S MOTION FOR A DIRECTED VERDICT.

A. The Court of Appeals departed from the flexible, common law standard of agency established by this Court in *Chambers*.

In *Chambers v Trettco*, 463 Mich 297 (2000), this Court adopted a flexible, fact-intensive standard derived from the common law of agency for determining when an employer is responsible for a sexually hostile work environment created by one of its supervisors. In place of that standard, the Court of Appeals has substituted a rigid scheme whose fundamental premises and specific applications depart from the fundamental holding of *Chambers*.

In interpreting the Act as it did—and in granting a motion for a directed verdict—the Court of Appeals committed errors of law that are subject to de novo review by this

Court. *Bertrand*, 449 Mich at 617-618. As will be seen, the Court of Appeals' errors threaten to thwart the prevention of sexual harassment, which is the fundamental purpose of the relevant section of the Elliott-Larsen Act.

In this section, the amici begin with a discussion of *Chambers* and of the common law of agency, then move to a discussion of the *Elezovic* opinion, and conclude with a discussion of the significance of the difference between the two standards in light of the well-established facts about how sexual harassment is actually reported.

Beginning, then, with *Chambers*, in that case the Court adopted the following standard for determining employer liability:

> Under the Michigan Civil Rights Act, an employer may avoid liability [in a hostile environment case] if it adequately investigated and took prompt and adequate remedial action upon notice of the alleged hostile work environment.
>
> *Id.*, 463 Mich at 312 (internal quotations omitted).

As set forth in that quotation, adequate notice triggers a duty to investigate, which, if the investigation sustains the charge, triggers a duty to take appropriate remedial action. On the crucial issue of notice, the Court held that notice of sexual harassment was adequate to trigger the duty to investigate, "...if, by an objective standard, the totality of the circumstances were such that a reasonable employer would have been aware of a substantial probability that sexual harassment was occurring." *Id,* 463 Mich at 319.

In adopting that standard, this Court fashioned a specific application of the common-law principle that "A master is not subject to liability for the torts of his servants acting outside the scope of their employment unless ...(b) the master was negligent or reckless." 1 Restatement Agency, 2d, s. 219(2)(b), at 481-482. As the Restatement makes clear, the common law had long held that the master could be

negligent or reckless in a variety of ways that are applicable to sexual harassment claims:

> (b) in the employment of improper persons...in work involving risk of harm to others; or
>
> (c) in the supervision of the activity, or
>
> (d) in permitting, or failing to prevent, negligent or other tortuous conduct by persons...upon premises under his control.
>
> 1 Restatement Agency, 2d, s 213, at 458.

In fact, long before *Chambers*, this Court had already applied those principles in holding that an employer could be held liable for on-duty assaults perpetrated by one of its employees upon a business invitee if the employer had been negligent in selecting or retaining the employee in the particular position in light of the knowledge that it had as to that employee's prior misconduct. *Hersh v Kentfield Builders, Inc.* 385 Mich 410 (1971). The overwhelming majority of courts in the United States had adopted a similar standard, sometimes calling it a principle of agency and sometimes calling it a principle of torts. See Restatement at ss 213, 219. See also Prosser, Torts, 5th ed, at 502.

As is apparent, the principles set forth in the Restatement, in *Hersh*, and in *Chambers* are flexible and fact-intensive. The Restatement is phrased in general terms that must be applied by the trier of fact. *Hersh* hold that "Whether the employer knew or should have known of [the employee's] violent propensities should not be determined by any court as a matter of law, but by the jury." *Id.*, 385 Mich at 415. Similarly, in *Chambers*, this Court held that the notice must be judged based upon the "totality of circumstances" known to the employer. *Chambers*, 436 Mich at 319.

The *Elezovic* panel claimed adherence to *Chambers*, but it departed from the flexible, fact-intensive standard set forth in Chambers and the common law. Instead, it

forced both notice and liability into two rigid boxes—actual and constructive knowledge—and then defined both so narrowly that companies would have no duty even to investigate many, if not most, of the actual reports of sexual harassment that they received.

Specifically, the *Elezovic* panel held that an employer had actual knowledge of sexual harassment—and thus a duty to act—*if and only if* the victim filed an explicit complaint about the harassment with "higher management." *Elezovic*, 259 Mich App at 193-194. Similarly, it held that an employer had constructive knowledge of the sexual harassment—and thus a duty to act—*if and only if* the plaintiff shows that "...the [individual supervisor's] conduct was so pervasive that it gives rise to the inference of knowledge or constructive knowledge." *Id.*, at 196.

As illustrated by this case, the difference between *Chambers* and in *Elezovic* is of decisive significance. As set forth in more detail in section E below, before Elezovic filed suit, Ford had received (1) explicit reports of four prior acts of severe sexual harassment perpetrated by Bennett during the course of his employment at Ford; (2) explicit reports of the severe harassment that Bennett perpetrated upon Elezovic; (3) written reports by Elezovic's doctor and her son-in-law that Bennett was "harassing," discriminating against," and creating "a hostile environment" for Elezovic; and (4) an explicit report by Bennett to plant management claiming that Elezovic and another Ford employee were planning to file what he called false charges of sexual harassment against him. *Elezovic*, 259 Mich App at 194-197, 207-208.

Under the *Chambers* "totality of circumstances" standard, this was more than sufficient notice to trigger Ford's duty to investigate the charges against Bennett. Under

the *Elezovic* standards, however, the panel was able to cast aside each element of notice—and conclude in the face of all of the evidence set forth above that Ford had no notice that Bennett was harassing the employees under his supervision.

But the difference between the *Chambers* and *Elezovic* standards is decisive, not only in this case, but in almost all cases alleging a violation of the Act. When the two standards are analyzed in light of the way that women actually report sexual harassment, it is apparent that the *Chambers* standard takes account of that reality—while the *Elezovic* standard ignores it completely. And it is apparent that *Chambers* offers hope of combating sexual harassment—while *Elezovic* will result in the virtual elimination of an effective incentive to end sexual harassment in the workplaces of the state.

The Harvard Law Review recently described the reality that *Elezovic* ignores. Most women fear that they will be retaliated against if they report sexual harassment. In part due to the explosive reaction that a charge of sexual harassment frequently produces, the Harvard Law Review article concluded that there is considerable empirical research establishing that there is a rational basis for that fear:

> Harassment complaints often lead to negative job evaluations, denials of promotions, transfers, and firing. Informal sanctions from co-workers and supervisors, such as withdrawal of job support and social support, are also common. Moreover, a harassment victim may be publicly labeled a liar, hysteric, or troublemaker.
>
> Note, *Notice in Hostile Environment Discrimination Law*, 112 Harv L Rev 1977, 1987 (1999)(citations omitted).

A still more recent article in the William and Mary Journal of Women and the Law confirms and updates that conclusion. Beiner, *Sex, Science and Social Knowledge: the*

Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment, 7 Wm & Mary J. Women & L 273 (2001).[2]

The victims' fear of retaliation—compounded by guilt, shame, concern for their families, and a belief that it would do no good to file charges—lead most women to attempt to endure, ignore, or deflect sexual harassment. Some attempt to escape it by transferring to another job or shift—or by quitting. Some seek support from co-workers or a friendly supervisor. A few succumb in the hopes that that will placate the harasser. But while many women believe that they would file charges if harassed, the reality is that when it happens, "Very few harassment victims...choose formal channels of complaint." 112 Harv L Rev at 1989-1990; 7 Wm & Mary J Women & L, at 311-317.

By nature, it is difficult to say how few choose that avenue. Even in a highly-regulated civil service system with many women employees, however, a study by the United States Merit System Protection Board found that only 12 percent of federal civil servants who had been sexually harassed *ever* filed *any* report at *any* time with *any* supervisor. 7 Wm & Mary J. Women & L at 312. In predominantly male workplaces and in all workplaces where harassment is particularly pervasive—that is, in workplaces where women have more fear, less support and less hope—the number of complaints is far fewer. See 112 Harv L Rev at 1987-1988.

Especially in those workplaces, even if notice is given, it is likely to be delayed, incomplete, and conveyed to low-level supervisors in whom the woman has some trust.[3]

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[2] The William and Mary Journal of Women and the Law cites one particularly revealing study: of 88 formal sexual harassment complaints filed with the California Fair Employment and Housing Department, nearly half of those complaining were fired, with an additional 25 percent choosing to resign. 7 Wm & Mary J. Women & L at 312.

[3] The four Wixom cases are a perfect illustration of this truth. Assuming that what the four women have said is true—which is required at the stage of the proceedings in each

Under the *Chambers* standard, if the employer received such notice, it would be charged with a duty to investigate whether sexual harassment was in fact occurring. As the jury would evaluate the notice, the investigation, and, if it occurred, the remedial action under the "totality of the circumstances" standard, the jury could take into account the realities described above. Under *Elezovic*, however, an employer would have no duty *even to investigate* any notice of sexual harassment except in the rare case where the victimized woman marches into the office of a high management official and tells him explicitly what has occurred—or in the equally rare case in which the harassment was so widespread and public that large sections of the plant already knew about it.

Under *Chambers*, personnel officials will be charged with investigating complaints so as to prevent sexual harassment. Under *Elezovic*, however, they could sit idly as the reports of sexual harassment flowed in—as long as the particular woman did not make an explicit complaint to a high management official.[4]

As set forth in more detail below, the *Elezovic* panel adopted numerous specific standards that departed from the Act. It held that prior complaints by other employees of

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of the four Wixom cases—four women were subjected to severe sexual harassment by a single supervisor. Despite the fact that that harassment occurred over the course of four years, two women (McClements and Perez) did not file reports for, respectively, two and three years, one (Elezovic) filed a report in "confidence" with two low-level supervisors, and only one (Maldonado) filed reports with higher officials—and even she only did so because the higher official were, respectively, an uncle by marriage and a former supervisor and religious colleague of hers at the Wixom plant.

[4] During the course of the litigation in *Maldonado, McClements* and *Perez*, Ford has frequently argued that imposing upon women a duty to report sexual harassment complaints to high-level managers will further the purpose of the Act by requiring prompt notice and investigations. But as set forth above, the reasons for not reporting or for filing delayed, ambiguous reports with lower-level supervisors are extremely deep-seated. It is not rational to think that any standard announced by this or any other Court would encourage women to report significantly more acts of sexual harassment. It is, however, to think that a reaffirmation of the *Chambers* standard would encourage employers to be more active in investigating reports of sexual harassment.

sexual harassment by the same man could not provide notice. Similarly, it held that the company's knowledge of the most egregious acts of sexual harassment by the same man off the company's premises was so irrelevant that it should be excluded from evidence. Likewise, it held that reports to any agent of the company other than a "high management official" should be ignored. And, finally, it held that reports given in confidence to supervisors should be disregarded—even if the woman made that request because she was terrified.

As set forth in order below, each of these specific rulings is wrong. But the fundamental error of the *Elezovic* panel is that it attempts to abandon the *Chambers* totality of the circumstances standard in favor of a myriad of specific standards in which the courts dissect notice in ways that will screen out virtually every notice of sexual harassment that will actually be received by employers in this state. As the Elezovic standard will drastically limit the ability of the state to prevent sexual harassment, this Court should reverse the holding and reinstate the totality of the circumstances standard set forth in Chambers.

B. The *Elezovic* panel erred by excluding from consideration Ford's knowledge of the other acts of sexual harassment perpetrated by Bennett.

1. Bennett's harassment of other employees.

In *Chambers*, the facts did not present the question of the significance of prior reports to the employer from other women that the same supervisor had sexually harassed them. As a result, at some points, *Chambers* states that the company has to have notice that there is a substantial probability that sexual harassment was occurring. *Chambers*, 463 Mich at 312-313. At other points, it states that the company has to have notice that

the plaintiff is being sexually harassed. *Id.*, 463 Mich at 319. On the facts present in *Chambers*, the two statements amounted to the same standard, as there was no evidence that the company had notice of any other sexual misconduct by the man who had allegedly harassed the plaintiff.

But that evidence is present here, in two forms that have general significance for the law of sexual harassment. First, there is evidence that well before Elezovic filed suit, Ford employee Justine Maldonado complained to top Ford managers that Bennett, who was also her supervisor, had exposed himself to her on two occasions on the grounds of the Wixom plant and on one occasion when he followed her on her way home from work (Tr 8/16, 99-103, 114-118, 120-123). Second, there is evidence that well before Elezovic filed suit, Ford learned from the Wixom police that Bennett had followed three teenagers down the freeway, exposing his penis to the girls as he drove alongside their car. *Elezovic*, 259 Mich App at 205. In neither case did Ford even investigate the reports (Tr 8/16, 121).

Both reports present essentially similar questions to this Court: If a company knows of and does nothing about prior acts of sexual harassment by the same man, is that evidence relevant or sufficient to prove that the company is responsible for the subsequent harassment of another woman by the same man? While both Maldonado's report and that of the Wixom police present similar issues, the amici will address the two reports separately because each is presented in a different procedural context.

Beginning with Maldonado's report, the *Elezovic* panel held as a matter of law that "...the complaint of alleged sexual harassment of plaintiff's coworker cannot be said to establish notice with respect to plaintiff's claim of harassment." *Elezovic*, 259 Mich

App at 196. Apart from a misplaced reliance on the prior decision of the Court of Appeals in *Sheridan v Forest Hills Pub Schools*, 247 Mich App 611 (2001), *lv den* 466 Mich 888 (2002),[5] the Court of Appeals provided no reasoning or precedent in support of this assertion—because there is none.

Under the common law of agency—which *Chambers* adopted—the employer's "...knowledge of *past* acts of impropriety, violence, or disorder on the part of the employee is *generally considered sufficient to forewarn the employer* who selects or retains such employee in his service..." *Hersh v Kentfield Builders, Inc.* 385 Mich 410, (1971)(emphasis added). *Accord*, Prosser, Torts, 5th ed, at 502; 1 Restatement Agency, 2d, ss 213, 219, at 458, 481-482. As set forth above, another panel of the Court of Appeals has already applied that principle in holding that another of Bennett's victims could maintain a negligent retention claim against Ford based on the fact that it did nothing after receiving the reports from Maldonado and the Wixom police. *McClements v Ford Motor Company*, unpublished Ct App Op, Ct App No 243764, *app lv pending* No. 126276. The *Elezovic* panel did not provide—and Ford cannot provide—a reason that an plaintiff can maintain a common-law claim based on these facts—but not a claim under a broad remedial statute that was specifically designed to expand the remedies available under the common law.

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[5] *Sheridan* differs from the case at bar in two crucial ways. First, in *Sheridan,* the employer *did* investigate the possibility that the plaintiff was being harassed – in part as a result of the prior complaints. When the employer's investigators questioned the plaintiff, however, she absolutely denied that she was being harassed. *Id.*, 247 Mich App at 545-546. Second, of the prior complaints in *Sheridan*, one was ambiguous and one had resulted in remedial action being taken, with no indication that it had not been effective. *Id.*, 247 Mich App at 546. As is apparent, *Sheridan* does *not* stand for proposition that prior complaints cannot provide notice of a danger of sexual harassment that the employer has a duty to prevent.

Applying respondeat superior standards *identical* to those of *Chambers,*[6] the federal courts have unanimously held that a woman employee claiming that she was sexually harassed in violation of Title VII should have the same rights as a woman invitee who claims that she was sexually harassed in violation of the common law. Specifically, the federal courts have held that if an employer receives does nothing about a report that supervisor has harassed woman A, the jury may conclude that it is responsible for that supervisor's later harassment of woman B because that was not only a foreseeable risk, but one that was increased by the company's failure to do anything in response to the earlier report.

The Tenth Circuit, for example, held as follows:

> We believe that US West [the employer] may be put on notice if it learns that the perpetrator has practiced widespread sexual harassment in the office place, even though US West may not have known that this particular plaintiff was one of the perpetrator's victims.
>
> *Hirase-Doi v U.S. West Communications, Inc.*, 61 F 3d 777, 783-784 (CA 10 1995), citing Prosser and the Restatement of Agency.[7]

Similarly, the Eleventh Circuit held as follows:

> A jury could reasonably infer from each of these allegations that World Services knew before Dees filed her complaint in August 1994 that supervisors were sexually harassing employees, yet failed to take any corrective action. We thus conclude that these allegations are sufficient to raise an issue of material fact as to whether World Services is both directly and vicariously liable for Dees' abuse, and that the district court inappropriately granted summary judgment in favor of

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[6] In each of the cases quoted below, the federal courts applied standards like that in *Chambers* either because the harassment was by a co-worker, in which case the federal and state standards remain the same, or was by a supervisor at a time and in a circuit where the federal standard for respondeat superior was the same as that announced by this Court in *Chambers.*

[7] The Tenth Circuit applied a general standard that the employer could be held liable for the harassment in that case if the plaintiff demonstrated that the company had "...fail[ed] to take appropriate action to remedy or prevent a hostile or offensive work environment of which management-level employees knew or in the exercise of reasonable care, should have known." *Hirase-Doi,* 61 F 3d at 783.

World Services.

Dees v Johnson Controls World Services, Inc., 168 F 3d 417, 423 (CA 11 1999).[8]

Likewise, a United States District Court denied summary judgment on the basis that the employer had ignored prior complaints about the same man:

> Plaintiff may survive summary judgment by adequately substantiating that: [1] [Lt. Williams'] prior conduct toward other female employees should have alerted [Defendant] to the likelihood that he would, despite warnings, also try to harass [Plaintiff]. [2] Such notice...imposed a duty on [Defendant] to take *adequate steps to try to prevent her harassment, not merely act after the event.*

Munn v Mayor, 906 F Supp 1577, 1584 (SD Ga 1995)(emphasis in original).[9]

Numerous other federal courts have rendered the same or similar rulings.[10]

In holding that Maldonado's complaint (and that of the women on I-275) could not *as a matter of law* "establish notice with respect to plaintiff's claim of harassment," the *Elezovic* panel completely ignored the common law of agency and the unanimous precedents decided under Title VII. If *Elezovic* was extended to its logical conclusion, Perez—who was harassed by Bennett after Ford had received reports by six other women that they had been harassed by Bennett—would have no cause of action even though Ford did nothing about any of the prior reports. Indeed, Bennett's Nth victim would have

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[8] The Eleventh Circuit applied a standard that an employer could be directly liable "when the employer knew or should have known about the harassment and failed to take remedial action." *Dees, supra*, 168 F 3d at 421.

[9] The district court held that the employer could be held liable if the plaintiff demonstrated that "...the employer knew, or should have known, of the harassment and failed to take prompt and adequate remedial action." *Munn, supra*, 906 F Supp at 1583.

[10] *Hurley v Atlantic City Police Department*, 174 F 3d 95, 110 (CA 3 1999), *cert den* 528 US 1074 (2000); *Hunter v Allis Chalmers Corporation*, 797 F 2d 1417, 1424 (CA 7 1986) (Posner, J); *Deters v Equifax Credit Information Services*, 202 F 3d 1262, 1271(CA 10 2000); *Jackson v Quanex*, 191 F 3d 647, 663-664 (CA 6 1999); *Paroline v Unisys Corp*, 879 F 2d 100, 107 (CA 4 1989), *rev'd on other grounds* 900 F 2d 27 (CA 4 1990); See *Bandera v City of Quincy*, 344 F 3d 47, 53 (CA 1 2003); *Parker v Olympus Health Care*, 264 F Supp 998, 1002-1003 (D Utah 2003). State courts have reached the same result under state statutes. See, e.g., *Bank One, Kentucky, N.A. v Murphy*, 52 SW

no cause of action if that victim decided that it was hopeless to complain after Ford had ignored N minus one prior complaints.

In reaching the result that it did, the *Elezovic* panel ignored the fact that Ford's duty to investigate and take remedial action is designed not only to punish Bennett for what he did – but to make sure that he did not harass other women in the future. As the experience at Wixom demonstrates, upholding that principle is vital for the safety of Elezovic – and of Maldonado, McClements, Perez, and of any other woman who works in a workplace where a serial harasser is present.

2. Bennett's harassment of the young women on I-275.

After holding that the reports from Maldonado could not establish notice to Ford of the danger posed by Bennett, the *Elezovic* panel upheld the outright exclusion of the evidence that Ford had known of and done nothing about the report that Bennett had "...followed a car on the expressway with three teenage girls in it, pulled alongside the girls' car, and began waving and pointing at his groin area, whereupon the girls saw that Bennett was masturbating." *Elezovic*, 259 Mich App at 205.

The Court of Appeals declared that this incident was "non-work related"—but there was absolutely no support for reaching this conclusion. *Id.* In an October 1997 memo, the President of the Ford Motor Company declared that driving the M-10 vehicles was part of Ford's effort to "...evaluate [vehicles] randomly selected from assembly lines as part of its continuing effort to design manufacture, and market" cars that are "superior to our competitors" (Tr 12/18/2000, at 19). The President of Ford further asserted that local plant management should assure that persons driving those vehicles—that is, persons like Bennett—should follow all legal requirements and procedures (Tr

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3(Ky Sup Ct 2001).

12/18/2000, at 19).

As Ford's Security Director testified, when supervisors drove the M-10 car, they were doing part of their job (R Dep of Sweeney, at 51).[11] If Bennett had been injured as a result of his operation of the M-10 vehicle, he would undoubtedly have claimed benefits under the worker's compensation act. If he had injured others in his operation of that vehicle, they would have filed suit against Ford under the State's auto negligence laws. In using that car, Bennett was performing his duties—and was clearly subject to Ford's rules and to Ford discipline for using company property to stalk and expose himself to teenage girls.

The trial court and the Court of Appeals erred by excluding this evidence because Ford had the power to discipline Bennett for what he had done—and its failure to do so signaled Bennett that he could harass Elezovic, Maldonado, McClements, Perez and anyone else without fear for his job.

Moreover, even if Bennett had been in his own car and quasi or even wholly off-duty when he stalked and exposed himself to the teenage girls, the trial court and the Court of Appeals nevertheless erred in attempting to exclude the evidence as to what Ford knew he had done. As this Court has held, the notice that Ford received as to Bennett's "past act of impropriety, violence, or disorder" is generally "sufficient to forewarn the employer who select[ed] or retain[ed] such [an] employee in his service...." *Hersh,* 358 Mich at 412. Indeed, acting under the common law, another panel has already held that this evidence was admissible and sufficient under the common law to warn Ford of the danger that Bennett posed. See *McClements.*

As with the case of a serial harasser a given workplace, the issue of the significance of serious off-duty sexual misconduct known to the employer is of great importance to women throughout the State. Employers may have no duty—and, in many cases no right—to ferret out information about purely off-duty misconduct. But they may nevertheless learn from many sources that a particular supervisor has engaged in such misconduct. If the misconduct is not serious—a remark at a party or a similar act – the employer should have no duty to investigate or take account of it. But where the off-duty misconduct is, as here, so severe that it constitutes criminal conduct, the employer may not simply stick its head in the sand.

In the most analogous precedent under Title VII, the Second Circuit, applying the same common law of agency that is the basis for *Chambers*, directly held that a company's duty to prevent sexual harassment in the workplace required it to take preventive action when it learned that an employee had committed major acts of sexual harassment off-premises and off-duty:

> The more egregious the abuse and the more serious the threat of which the employer has notice, the more the employer will be required under a standard of reasonable care to take steps for the protection of likely future victims. The district court may have been correct that Delta's ability to investigate was curtailed by the fact that the [earlier] rapes occurred off-duty. It does not follow, however, that the off-duty nature of the rapes absolved Delta of all responsibility to take reasonable care to protect co-workers...
>
> *Ferris v Delta Air Lines, Inc.*, 277 F 3d 128, 137 (CA 2, 2001), *cert den* 537 US 824 (2002).

The facts of *Ferris* are not, of course, identical to those present here.[12] But in

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[11] The plaintiff Elezovic filed the deposition of Michael Sweeney in December 2000 as an attachment to her briefs in opposition to the defendants' motion to exclude the evidence as to what Bennett had done to the high-school girls.

[12] Ford has tried to confine *Ferris* to its facts by claiming that it holds only that a company can receive notice where one of the members of a flight crew perpetrates an off-

important ways Bennett's stalking and exposing himself to the teenage girls provided even stronger notice to Ford than the analogous evidence provided to the employers in *Ferris* or *Hersh*. Ford had a definite report of misconduct conveyed by the police and soon corroborated by a conviction after a full trial on the merits. Moreover, the sexual misconduct did not occur before Bennett was employed or when he was off-duty in a hotel—but rather while he was acting under Ford's rules test-driving a car. Finally, Bennett was not a flight attendant or laborer—but a high-level manager supervising women working in remote areas of the plant at all hours of night.

Weighing whether Ford should have foreseen the danger of Bennett's harassment of women inside the plant based on what he had done in the M-10 car on I-275 is a question for the jury. That evidence, however, is clearly not "marginally probative evidence" that should be excluded under MRE 403. In fact, the trial court and the Court of Appeals cannot on the one hand exclude evidence proving notice because it is only "marginally probative"—and then direct a verdict because the plaintiff failed to provide sufficient evidence of notice to the company of the danger that Bennett posed.

In excluding evidence that has been held sufficient to support a cause of action for negligent retention—and that any reasonable jury could conclude was a serious warning sign that at least warranted investigation by Ford – the Court of Appeals has departed from *Chambers*' requirement that the jury be allowed to assess the reasonableness of the company's action based upon the totality of circumstances known to the company.

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duty assault upon another member of that crew under the unique circumstances of an overseas layover. Those circumstances were crucial in the Court's decision to hold Delta liable for the actual assault upon the plaintiff. As the above quotation makes clear, however, they were irrelevant to the Court's decision that Delta had a duty to act when it learned that the employee had committed major acts of sexual misconduct while he was off-duty. *Ferris, supra*, 277 F 3d at 137.

C. The *Elezovic* panel wrongly required that Elezovic report the sexual harassment to a high-management official.

Following *Sheridan* and *Jager*, the *Elezovic* panel held that Ford could be held to have actual knowledge of Bennett's harassment of Elezovic only if "higher management" had actual knowledge of that harassment. *Elezovic*, 259 Mich App at 193-194. According to the panel, the term "higher management" means persons who have "significant influence" in the hiring, firing and disciplining of the harassing employee. *Id.*

Neither *Chambers*, nor the common law, nor well-reasoned decisions by the federal courts support any such requirement—and for good reason. The average employee has no way of knowing to whom she must complain. Especially where the offending official is, like Bennett himself, a high management official, it strains credulity to require a woman who has been subjected to sexual harassment to track down an even higher official and insist on a meeting with that official in order to complain about the sexual harassment that she has endured.

In a decision that is directly on point, Judge Posner has written that in the absence of a clear policy stating that employees *must* complain to particular officials (and perhaps even then), the employer may *not* ignore a complaint because it was not given to a "high management official:"

> ...[W]hat is certain is that if the company fails to establish a clearly marked, accessible, and adequate channel for complaints, judicial inquiry will have to turn to who in the company the complainant reasonably believed was authorized to receive and forward (or respond to) a complaint of harassment.
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> *Young v Bayer Corp*, 123 F 3d 672, 674 (CA 7 1997).

As Judge Posner continued, notice of sexual harassment is sufficient to sustain a hostile environment action if the information.

> ...[e]ither (1) come[s] to the attention of someone who (a) has under the terms of his employment, or (b) is reasonably believed to have, or (c) is reasonably charged by law with having, a duty to pass on the information to someone within the company who has the power to do something about it; or (2) come[s] to the attention of such a someone.
>
> *Id.*, at 674. *Accord. Torres v Pisano*, 116 F 3d 625, 636-638 (CA 2 1997), *cert den* 522 US 997 (1997); *Bonenburg v Plymouth Township*, 132 F 3d 20, 27 n 7 (CA 3 1997).

In this case, Ford's own policies provide that an employee may complain to her own supervisor or manager – and that its supervisors have a duty to report any claim of sexual harassment to the Human Resources Department. Pl. Ex 28, at 3-5. As there is no basis for requiring any employee to anticipate that she must complain to an unspecified "higher management official" in order for her complaint to be effective, the Court of Appeals' requirement that the victim complain to a "higher management official" is not authorized by this Court's Opinion in *Chambers* or by the Elliott-Larsen Act.

D. The *Elezovic* panel wrongly disregarded *Elezovic*'s explicit reports of the sexual harassment.

Elezovic testified that in late summer 1995, Bennett called her over to a car near the rail yard inside the Wixom grounds. When she got to the car, she saw him masturbating, and he asked her for oral sex. He told her that no one would believe her if she complained (Tr 8/14, 108-111). Beginning late in1995, she reported this harassment once to Butch Vaubel, a supervisor in her department, and three or four times to Mr. Zuback, another supervisor in her department (Tr 8/14, 134-136, 162-163). Because she was afraid of retaliation from Bennett, she asked both of them to keep the matter in confidence (Tr 8/14, 121, 136; Tr. 8/15, at 162-163).[13]

[13] Zuback and Vaubel deny those reports. However, since the evidence must be taken in the light most favorable to the plaintiff, those denials are irrelevant to the issue before this Court.

Even though Ford's policy required those supervisors to report the complaints to their superiors, the *Elezovic* panel held that the notice was ineffective as a matter of law because the plaintiff Elezovic asked those supervisors to keep the matter in confidence. *Elezovic*, 259 Mich App at 194.

This holding, too, violates the entire policy of the Act. If a woman complained to a police officer that she had been raped by a particular man, the officer could not properly refuse to file a police report because she asked him to keep silent because she feared retaliation from the same man. If anything, the officer would be under a duty to encourage the woman to come forward.

Similarly, Ford's supervisors, who are charged with administering the ban on sexual harassment in the plant, may not refuse to report the matter to their supervisors because an employee is too terrified to do so. If anything, they have a greater duty to report complaints in those circumstances.

If Zuback and Vauble had conveyed the complaints to their supervisors, their superiors could have attempted to reassure Elezovic that she could come forward, without fear for her person or her job. Especially given the existence of other complaints about Bennett, the jury could reasonably conclude that Ford had a duty to do at least that much.

In one of the few reported cases on this issue, the United States Court of Appeals for the Second Circuit confronted the question now before this Court:

> We therefore have before us a situation in which an intimidated and embarrassed employee was finally able to gather the strength to complain about the harassment that she was enduring, but specifically asked the supervisor to whom she complained to keep the matter confidential and to refrain from taking action until a later date.
>
> *Torres*, 116 F 3d at 639.

In cases where the harassment was not severe, the Court held that the company could be relieved of liability because the victim had the right to choose whether she wanted to make the matter the subject of an official complaint. *Id.*

The Court then said, "There is certainly a point at which harassment becomes so severe that a reasonable employer simply cannot stand by, even if requested to do so by a terrified employee." *Id.* Especially in cases where the supervisor was "harassing a number of employees," the "employer's duty to the other employees would take precedence, and the company most likely would not be justified in honoring a single employee's request not to act." *Id.*

Both circumstances are present here. The harassment is obviously severe—and Ford's managers knew that Bennett had exposed himself to teenagers on the freeway. Put simply, a jury could properly conclude that Ford's supervisor did not act reasonably when he did nothing with Elezovic's report other than to say that he felt sorry for her and that she should "hang in there" (Tr 8/14, 134-135).

As with the other issues present in this case, Elezovic's fate is not different than other women faced with similar harassment. For her sake, and for the sake of others, this Court should reverse the panel's holding and remand this matter for trial so that the jury can determine whether Ford acted reasonably when its agents did nothing when she reported to them that she was too afraid to report extremely severe acts of sexual harassment that had been perpetrated upon her.

E. The *Elezovic* panel failed to review the totality of the circumstances in determining whether Ford had notice that there was a substantial probability that sexual harassment was occurring.

The *Elezovic* panel's departure from the *Chambers* standards stands out in the

entire structure of its Opinion. Instead of attempting to determine whether Ford had notice based on the totality of circumstances present in the record, the *Elezovic* panel split those circumstances into compartments and then dissected the evidence in each compartment, finding that each compartment, standing alone, did not provide sufficient notice to Ford.

According to the Court of Appeals itself, however, before Elezovic filed suit in November 1999, Ford's officials had the following reports as to the probability that Bennett was engaging in sexually harassment in general and of Elezovic in particular:

(1) In August 1995, the Wixom police advised Ford's top Wixom officials knew that Bennett had used a Ford M-10 car that he was test driving to follow and then expose himself to three high school girls on the highway. *Elezovic*, 259 Mich App at 205.

(2) In August 1995, Elezovic told two Ford supervisors in confidence that Bennett had masturbated in front of her inside the Wixom grounds. *Id.* at 194.

(3) In 1997 and 1998, Elezovic's psychologist, Dr. Fran Parker, wrote Ford on three occasions asserting that Elezovic was being "harassed" by Bennett. *Id.*, at 196.

(4) In April 1998, Elezovic's son-in-law, Paul Lulgjurag, an attorney, wrote the Director of Labor Relations at Wixom advising him that there were "ongoing acts of discrimination and retaliation" directed at Elezovic and demanded action to ensure that she was not subjected to a "working in a hostile environment." (Pl. Ex).

(5) In October 1998, Ford Wixom employee Justine Maldonado told a top management official and a Labor Relations official that Bennett had exposed himself to her while demanding sex, twice inside the Wixom grounds and once when he followed her home. *Elezovic*, 259 Mich App at 196; Tr 8/16, 99-103, 114-118, 120-123.

(6) In April 1999, Bennett himself advised top labor relations officials at Wixom that Elezovic and Maldonado were about to file charges of sexual harassment against him—charges that he claimed were false (Tr 8/20/01, 37; Tr 8/21/01, 189-192).

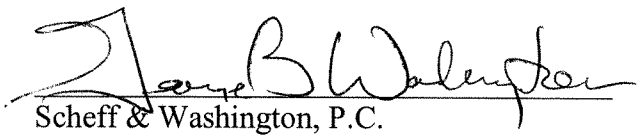
Before August 1999, Ford did not investigate whether Bennett was harassing Elezovic, Maldonado or anyone else. In August, it asked to question Elezovic, but when she refused to proceed without her counsel present, Ford simply dropped the matter (Tr 8/21/01, 146-147). Before Elezovic filed suit, Ford's personnel and labor relations officials never even asked to interview Maldonado, despite her repeated complaints (Tr 8/16/01, 121-124).

As the jury could properly conclude, the totality of the evidence set forth above should have set off warning sirens far more than sufficient to trigger a duty to *investigate* the charges against Bennett—a duty that Ford obviously breached. If sexual harassment is to be eliminated—and if the policy of the Elliott-Larsen Act is to have any meaning—this Court should reverse the decision of the Court of Appeals and remand this matter for a trial in which a jury could determine whether Ford acted reasonably in light of the totality of the circumstances known to it.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated, the amici Michigan NOW and Justine Maldonado, Milissa McClements, and Pamela Perez support the request of the plaintiff Lula Elezovic for a reversal of the decision of the decision by the Court of Appeals and a remand of this matter for trial, with the trial court instructed to admit the evidence of all of the reports of Daniel Bennett's misconduct to Ford, including that of his use of Ford's M-10 car to engage in sever harassment of teenage girls on the highway.

By the amici's attorneys,

By: 

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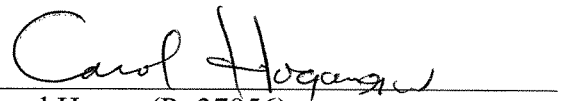
By: 

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Dated: September 23, 2004

STATE OF MICHIGAN
IN THE SUPREME COURT

LULA ELEZOVIC,

Plaintiff-Appellant

and

JOSEPH ELEZOVIC,

Plaintiff,

-vs-

FORD MOTOR COMPANY and
DANIEL P. BENNETT,

Defendant-Appellees.

Supreme Court Case No. 125166
Court of Appeals No. 236749
Wayne Cir Ct No. 99-934515-NO

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PROOF OF SERVICE

STATE OF MICHIGAN)
)ss
COUNTY OF WAYNE)

George B. Washington, being first duly sworn, hereby deposes and says that on September 23, 2004, he served two copies of BRIEF ON BEHALF OF THE AMICI CURIAE MICHIGAN CONFERENCE OF THE NATIONAL ORGANIZATION FOR WOMEN (NOW), JUSTINE MALDONADO, MILISSA MCCLEMENTS, AND PAMELA PEREZ and Proof of Service addressed to:

Julia Turner Baumhart
Kienbaum, Opperwall, Hardy & Pelton
325 South Old Woodward Avenue
Birmingham, Michigan 48009

Mark Granzotto
414 W. Fifth
Royal Oak, MI 48067

enclosed in an envelope, bearing postage fully prepaid, and depositing same in a United States mail receptacle in Detroit, Michigan.

GEORGE B. WASHINGTON

Subscribed and sworn to before me
this 23rd day of September, 2004.

ALLISON FELARCA, JR.
Notary Public, Wayne County, Michigan
My Commission Expires: 7-27-2008

STATE OF MICHIGAN

COURT OF APPEALS

JUSTINE MALDONADO,

Plaintiff-Appellant,

v

FORD MOTOR COMPANY and DANIEL P. BENNETT,

Defendants-Appellees.

UNPUBLISHED
April 22, 2004

No. 243763
Wayne Circuit Court
LC No. 00-018619-NO

Before: Borrello, P.J., and White and Smolenski, JJ.

PER CURIAM.

Plaintiff Justine Maldonado appeals as of right from the August 21, 2002 order of the Wayne Circuit Court granting defendants Ford Motor Company and Daniel Bennett's joint motion to dismiss her complaint on the ground that she and her attorneys engaged in prejudicial pretrial publicity. Plaintiff also appeals the trial judge's denial of her motion for recusal, which she filed on the basis that a member of defendant Ford Motor Company's law firm was the chair of the judge's re-election committee. Plaintiff also raises the issue whether the trial court abused its discretion in excluding evidence of Bennett's expunged conviction and the testimony of other female employees of Ford Motor Company. We affirm the decision of the trial court to exclude Bennett's conviction into evidence, and affirm the trial court on the issue of recusal. We reverse the trial court's ruling on the admissibility of testimony of other Ford employees. While we also reverse the trial court's dismissal of plaintiff's case, we remand the matter back to the trial court to conduct an evidentiary hearing to determine if plaintiff and her counsel tainted the jury pool.

I. Factual Background

In June 2000, plaintiff filed a lawsuit against defendants, alleging sexual harassment under the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq*. Specifically, plaintiff claims that defendant Bennett sexually harassed her in January and February 1998. Plaintiff testified in her deposition that on one evening, Bennett instructed her to take a production vehicle and drive it to a repair building some distance away. After dropping off the car, plaintiff got into Bennett's car. According to plaintiff, Bennett exposed his penis to her, demanding that she "suck it," and attempted to fondle her breasts and crotch. Plaintiff refused and got out of the car. Plaintiff further testified that a few days later, Bennett exposed himself again to her, using force to hold

her hand to his exposed penis. Plaintiff again said no, pulled away from his grasp, and left the area. At the time, plaintiff did not tell anyone at the plant about these incidents. Shortly thereafter, plaintiff was transferred out of Bennett's department and was laid off. In June 1998, plaintiff was called back to work in a different section of the plant. Plaintiff testified that when she left work one evening, she saw Bennett following her as she left I-275 on her way home from work. Plaintiff contends that Bennett got out of his car, walked up to plaintiff's car, reached in to tug at the chest area of her blouse, and asked her to have sex with him in the nearby bushes. When plaintiff refused, Bennett returned to his car. As plaintiff drove away, she looked back to see Bennett sitting in his car, masturbating. According to plaintiff, from June 1998 through August 1999, Bennett continued to harass her at the plant, grabbing his crotch, and making obscene gestures with his tongue. Plaintiff contends that several other employees were similarly harassed by Bennett.

Plaintiff also contends that she became aware of an incident where Bennett exposed himself to young girls. According to plaintiff, Bennett began following three high-school girls in a van driving next to their van and exposed himself as both vehicles drove down the expressway. Following a bench trial in district court in November 1995, Bennett was convicted of indecent exposure. After his conviction, Bennett continued to work as a superintendent at Ford's Wixom plant. His arrest and conviction were later expunged. Plaintiff sought to have Bennett's conviction introduced into evidence at trial thereby prompting Judge MacDonald to enter an order granting defendants' joint motion in limine to exclude evidence of Bennett's conviction for indecent exposure.

Shortly after the court entered the order excluding the conviction, plaintiff's attorneys circulated a press release announcing that they intended to file a motion to disqualify Judge MacDonald. They also provided details of Bennett's conviction for indecent exposure, which were subsequently disseminated in a series of news broadcasts and print stories. Plaintiff subsequently moved to disqualify Judge MacDonald, who stayed further proceedings, including trial. Judge MacDonald denied plaintiff's disqualification motion. Plaintiff then appealed Judge MacDonald's decision to the Chief Judge of the Wayne Circuit Court, who denied the appeal. Plaintiff thereafter sought leave of the trial court's decision to exclude the evidence, which had been denied by this Court and our Supreme Court. In February 2002, when Judge MacDonald was assigned to the Family Division of the Wayne Circuit Court, the case was reassigned to Judge Giovan.

Thereafter, defendants filed another joint motion in limine, seeking to exclude testimony about Bennett's treatment of women other than plaintiff. Following the hearing, the trial judge met with the parties' attorneys in chambers to discuss the public comments of plaintiff's attorney.

Subsequently, plaintiff and plaintiff's counsel were interviewed by television and newspaper reporters regarding Bennett's conviction. On May 28, 2002, plaintiff was asked to speak about her case at a town hall meeting. According to defendants, plaintiff and her counsel mentioned Bennett's conviction at the town hall meeting. An article about sexual harassment at Ford's Wixom plant also appeared as the cover story of the *Metro Times* on June 12, 2002, in which plaintiff's counsel provided information about Bennett's conviction.

Following Judge Giovan's assignment of the case, plaintiff brought a motion to dissolve the order excluding evidence of Bennett's conviction. Following the hearing, the trial court denied plaintiff's motion to dissolve Judge MacDonald's order excluding evidence of Bennett's prior conviction and granted defendants' motion in limine to exclude testimony of other women about Bennett's sexual harassment. During the hearing on June 21, 2002, Bennett's counsel raised concerns about plaintiff and her counsel providing information of the excluded evidence of Bennett's conviction to the *Metro Times*, especially since the case was approaching trial. In response to such allegations, the trial Court stated:

> THE COURT: I'm not making any decisions about this, but I'm going to tell you one thing. If I ever reach the conclusion that somebody is violating that ethical obligation and causing some difficulty in our getting a fair jury, I will dismiss the case with prejudice, or, and I should say, on the other side, grant a default judgment. I just want everyone to know that. And then whatever counsel is involved can answer to their client.

Shortly thereafter, plaintiff gave deposition testimony in which she indicated that she intended to continue publicizing information about Bennett's expunged conviction. A few days later, on June 26, 2002, plaintiff and her counsel appeared with the "Justice for Justine Committee" at a press conference held in front of Ford's world headquarters in Dearborn. Leaflets containing information about Bennett's conviction were handed out during the press conference.

On July 1, 2003, plaintiff filed an emergency motion to disqualify Judge Giovan. After a hearing on July 3, 2002, Judge Giovan denied the motion. The basis of plaintiff's disqualification motion was that a chairman of Judge Giovan's re-election campaign, Kelvin Scott, was a lawyer with the firm defending Ford in the present case.

At the close of arguments, Judge Giovan denied the disqualification motion. Afterward, one of plaintiff's counsel, Miranda Massie, while being interviewed by Channel 4, WDIV, said on television:

> Metro Detroit has a company town feeling, and it's hard to get a fair hearing from any of these judges when you're going against the Ford Motor Company. They'll stop at nothing to maintain the culture of abuse that exists in those plants, and we've found it hard to get unbiased rulings in these cases.

Defendants then brought a joint motion for dismissal, predicated on plaintiff and her counsel engaging in improper pre-trial statements. Thereafter, the trial court issued an opinion and order granting defendants' joint motion to dismiss. The trial court based that its dismissal on its "inherent power to impose sanctions on the basis of the misconduct of a party or an attorney." The trial court held that in "[t]he case at bar . . . . (1) the pretrial publicity here has been instigated by the plaintiff and her counsel, and (2) the publicity *does* contain repeated references to evidence ruled inadmissible at trial" (emphasis in original). Thus, Judge Giovan concluded that he had the authority to dismiss plaintiff's case for misconduct on the basis that "[plaintiff] and her attorneys [had] premeditatedly threaten[ed] the integrity of the judicial process." In addition to citing the inherent power of the court, Judge Giovan, citing MCR 2.504 and MCR

2.313, also concluded that "there is sufficient authority in the court rules themselves for the grant of a dismissal or a default in appropriate cases."

II. Dismissal of the Matter

Plaintiff contends that the trial court's dismissal of her case violated her right to free speech and freedom from discrimination. Plaintiff states there was no legal or factual support for the trial court's sanction against plaintiff's attorneys, absent a hearing to conclude whether the jury pool had been tainted by plaintiff's pre-trial publicity. Another argument of plaintiff is that she and her attorneys have a protected First Amendment right to speak out against sexual harassment at the Ford Wixom plant by publicizing the fact of Bennett's conviction. Conversely, defendants assert that plaintiff and her attorneys repeatedly refused to abide by the rulings of the trial court, despite the fact that they were warned by the trial court that any further attempt to taint the jury pool would result in dismissal. In particular, defendants point to the fact that plaintiff admitted she publicized Bennett's expunged conviction at her deposition, during a television interview, and at a demonstration at the Ford Wixom plant.

In *Persichini v Beaumont Hospital*, 238 Mich App 626, 639; 607 NW2d 100 (1999), this Court noted that it has "repeatedly recognized that a trial court has inherent authority to impose sanctions on the basis of the misconduct of a party or an attorney." At issue in *Persichini, supra*, was the trial court's ability to impose sanctions for defendant's attorney fees, lost income and travel expenses of witnesses. Our Court stated that the question whether the trial court has the authority to impose such awards as a sanction is a question of law, subject to review de novo, whereas an exercise of the court's inherent power may be disturbed only upon a finding that there has been a clear abuse of discretion. *Id.* at 637, 642. In *Cummings v Wayne County*, 210 Mich App 249; 533 NW2d 13 (1995), witnesses experienced incidents of vandalism and received numerous telephone calls and threats that they would be killed if they testified. Acting upon these reports from witnesses, the trial court held an evidentiary hearing, during which extensive testimony was elicited and affidavits received from the witnesses regarding the threats and vandalism. These incidents were attributed to plaintiff. Defendant subsequently moved for dismissal with prejudice on the basis of witness tampering. The trial court granted the motion. In affirming the decision of the trial court, our Court held:

> The authority to dismiss a lawsuit for litigant misconduct is a creature of the "clean hands doctrine" and, despite its origins, is applicable to both equitable and legal damages claims. *Buchanan Home & Auto Supply Co v Firestone Tire & Rubber Co*, 544 F. Supp. 242, 244-245 (D SC, 1981). The authority is rooted in a court's fundamental interest in protecting its own integrity and that of the judicial process. *Id.* See also *Mas v Coca-Cola Co*, 163 F.2d 505, 507 (CA 4, 1947). While this Court has recognized that substantive distinctions between law and equity survived the procedural merger of law and equity, see Clarke v Brunswick Corp, 48 Mich App 667, 669; 211 NW2d 101 (1973), we do not believe that the distinction prevents a court of law from invoking the "clean hands doctrine" when litigant misconduct constitutes an abuse of the judicial process itself and not just a matter of inequity between the parties. The "clean hands doctrine" applies not only for the protection of the parties but also for the protection of the court. *Buchanan Home, supra* at 244. "Tampering with the administration of justice . . . is a wrong against the institutions set up to protect and safeguard the public,

institutions in which fraud cannot complacently be tolerated consistently with the good order of society." *Hazel-Atlas Glass Co v Hartford-Empire Co*, 322 US 238, 246; 64 S Ct 997; 88 L Ed 1250 (1944). See also *Precision Instrument Mfg Co v Automotive Maintenance Machinery Co*, 324 US 806, 814-815; 65 S Ct 993; 89 L Ed 1381 (1945). *Id.* at 252.

In this case, the first issue is whether the trial court possessed the legal authority to dismiss plaintiff's complaint with prejudice on the basis that plaintiff and her attorneys intentionally and repeatedly disclosed excluded evidence through the public media for the purpose of tainting the jury pool so as to deny defendants a fair trial. In dismissing plaintiff's complaint, the trial court relied upon its inherent powers under the court rules, which it found in MCR 2.504 and MCR 2.313. MCR 2.504(B)(1) states that a defendant may move for dismissal of an action or a claim against the plaintiff if the plaintiff fails to comply with "these rules or a court order." While the trial court never issued a written order precluding plaintiff or her counsel from engaging in pre-trial publicity, it did warn the parties on the record, stating, "If I ever reach the conclusion that somebody is violating that ethical obligation and causing some difficulty in our getting a fair jury, I will dismiss the case with prejudice, or, and I should say, on the other side, grant a default judgment." Consequently, the trial court opined that plaintiff and her counsel, despite warning from the court, had attempted to taint the jury pool by continuing to disseminate excluded evidence.[1]

Our trial courts possess the legal authority to sanction litigants and their counsel, including the right to dismiss an action. This legal authority is not governed so much by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. See *Chambers v NASCO, Inc*, 501 US 32, 43; 111 S Ct 2123; 115 L Ed 2d 27 (1991). Having found that the trial court possessed the legal authority to dismiss this action, we next turn our analysis to whether the trial court's dismissal of the case constituted an abuse of discretion.

On appeal, plaintiff maintains that the trial court had no legal or factual basis to sanction plaintiff or her attorneys for their conduct in this case. Plaintiff and her counsel contend that she and her attorneys have a protected First Amendment right to speak out against sexual harassment at the Ford Wixom plant by publicizing the fact of Bennett's conviction.

In *Davis v Dow Corning Corp*, 209 Mich App 287, 294; 530 NW2d 178 (1995), this Court, citing *Gentile v State Bar of Nevada*, 501 US 1030, 1072-1073; 111 St Ct 2720; 115 L Ed2d 888 (1991) and *Seattle Times Co v Rhinehart*, 467 US 20, 32; 104 S Ct 2199; 81 L Ed 2d 17 (1984), stated that "it is not a violation of the First Amendment to impose certain restrictions on attorney speech in the context of litigation and in order to remedy ethical violations." This Court further noted in *Davis, supra* at 295-296, that, in *Gentile*, the United States Supreme Court "recognized that membership in the bar is a privilege that comes with conditions" and that "obedience to ethical precepts may require abstention from what, in other circumstances, would

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[1] We find that the trial court's reliance on MCR 2.313 was misplaced because the rule pertains to discovery sanctions.

be constitutionally protected speech." Additionally, our Court stated that "an attorney may not, by speech or by other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal." *Id.* at 204, quoting *Gentile, supra* at 1071.[2]

However, as the Supreme Court noted in *Gentile, supra* at 1075, limitations on attorney speech must be "narrow and necessary." In *Gentile*, the Supreme Court addressed the standard governing the state's ability to discipline an attorney, under an ethical rule that is identical in all relevant respects to MRPC 3.6, regarding speech about parties or proceedings in which the attorney was involved. In *Gentile*, the United States Supreme Court, rejecting the attorney's claim that he should be subject to a "clear and present danger" standard applicable to the press, concluded that the "substantial likelihood of material prejudice" standard was constitutional as applied to the attorney:

> The "substantial likelihood" test . . . is constitutional . . . for it is designed to protect the integrity and fairness of a state's judicial system and it imposes only narrow and necessary limitations on lawyers' speech. The limitations are aimed at two principal evils: (1) comments that are likely to influence the actual outcome of trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found. [*Id.*]

Unlike the trial court in *Cummings, supra*, in this case the trial court did not conduct an extensive evidentiary hearing to specifically determine whether the conduct of plaintiff and her attorneys caused any prejudice to the defendants' right to a fair trial. Therefore, it cannot be determined by the record before us whether the public dissemination of Bennett's conviction by plaintiff and her attorneys prevented defendants from receiving a fair trial on the ground that the jury pool was tainted. In the absence of an extensive evidentiary hearing, it is not clear whether the trial court dismissed plaintiff's complaint on the basis of an assumption that the pretrial publicity jeopardized the defendants' right to a fair trial. Also, unlike *Cummings*, where dismissal with prejudice on the basis of witness tampering was the only reasonable remedy in view of the numerous incidents of vandalism and death threats, it appears that dismissal here was the only sanction considered by the trial court. Although we hold that a trial court has the inherent authority to dismiss a case for egregious misconduct, the question presented here is whether dismissal was the proper sanction where other less drastic remedies were available to ensure that defendants received a fair trial. Because it appears that the trial court based its decision in large measure on presumption, we conclude that the trial court abused its discretion by dismissing plaintiff's complaint without conducting a full evidentiary hearing.[3]

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[2] We note that while such constraints may be placed on legal counsel (See MRPC 3.6), they do not apply to plaintiff.

[3] Because we find that the trial court abused its discretion by dismissal of this action prior to a full evidentiary hearing, we need not fully decide the issues of First Amendment rights raised by plaintiff and amicus curie ACLU except to state that the trial court never issued an explicit order – written or oral stating what speech was limited. Therefore, the trial court dismissed this matter under an unconstitutionally vague standard that conflicts with the due process requirements set

(continued...)

We therefore reverse the trial court's dismissal and remand the matter to the trial court for a full evidentiary hearing to determine whether under the "substantial likelihood" test in *Gentile, supra*, the conduct of plaintiff and her attorneys generated pretrial publicity that contaminated the jury pool so as to deprive defendants of a fair trial.

III. Exclusion of Evidence

Plaintiff next contends that the trial court abused its discretion by excluding evidence of Bennett's conviction. We disagree. We adopt the ruling of this Court in *Elezovic v Ford Motor Company*, 259 Mich App 187; 673 NW2d 776 (2003), *special panel denied,* 259 Mich App 801 (2003), which held on this same evidentiary issue:

> The trial court did not abuse its discretion in excluding, under MRE 404(b) evidence of Bennett's 1995 conviction of indecent exposure and the facts associated with that conviction . . . . To be admissible under MRE 404(b), evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice, MRE 403. *People v Starr*, 457 Mich 490, 496, 498; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *Id.* at 74. The trial court did not abuse its discretion in excluding evidence of Bennett's conviction. Plaintiff failed to establish that the evidence was offered for a proper purpose. Bennett's act of indecent exposure outside the workplace is not sufficiently similar to sexually harassing an employee in the workplace to establish a common plan, scheme, or system. *People v Sabin (After Remand)*, 463 Mich 43, 63-66; 614 NW2d 888 (2000). Unlike in *Sabin, Id.* at 64-65, here, there was not a sufficiently strong showing that evidence of Bennett's conviction shared a "concurrence of common features" with his alleged sexual harassment of plaintiff. Further, even if the evidence was admitted for a proper purpose, we would find no abuse of discretion in the court's exclusion of the evidence otherwise under MRE 404(b). . . . We also reject plaintiff's claim that Bennett's conviction was admissible against Ford because it was essential evidence of notice to Ford of Bennett's conduct, which was necessary to proving respondeat superior. *Chambers, supra* at 312. As plaintiff correctly notes, the Michigan Supreme Court has taken a "sliding scale" approach to the MRE 403 analysis. See *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). "The idea of prejudice denotes a situation in which there exists a danger that marginally probative evidence will be given undue or pre-emptive weight by the jury." *Mills, supra* at 75, quoting

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(...continued)

forth in *Gentile, supra.* Having found that the trial court never issued a direct order pertaining to which speech was prohibited we need not decide the issues of constitutionality of such orders raised by amicus curie ACLU. We do however recommend that on remand of this matter, the trial court issue a constitutionally valid order restraining the parties and their counsel from engaging in impermissible pretrial publicity.

> *Sclafani v Peter S Cusimano, Inc*, 130 Mich App 728, 735-736; 344 NW2d 347 (1983). Plaintiff contends that Bennett's conviction was highly probative evidence and should have been admitted because it was "absolutely essential background fact" in considering the totality of the circumstances with regard to notice. *Sheridan, supra* at 622. Plaintiff maintains that knowledge of the indecent exposure conviction would lead a reasonable employer to conclude that plaintiff's general complaints about Bennett were indicative of sexual harassment. Plaintiff asserts that such essential evidence can never be excluded under MRE 403. We find plaintiff's argument unconvincing. Plaintiff had previously made a specific complaint of sexual harassment against her union committeeman at Ford and, on the contrary, voiced only nonsexual complaints against Bennett. Under these circumstances, we cannot agree with plaintiff's contention that the evidence was essentially conclusively probative of notice. Plaintiff has otherwise failed to show any link between Ford's knowledge of Bennett's indecent exposure conviction and Ford's receipt or investigation of plaintiff's work complaints. The court did not abuse its discretion in excluding the conviction evidence on the basis that its probative value was substantially outweighed by the danger of unfair prejudice. At most, the evidentiary issue presented a close question. There can ordinarily be no abuse of discretion in a trial court's decision regarding a close evidentiary question. *Sabin, supra* at 67. *Elezovic, supra* at 206-208.

We therefore conclude that the trial court did not abuse its discretion in denying plaintiff the right to introduce Bennett's conviction for indecent exposure.

Plaintiff next argues that the trial court abused its discretion by excluding testimony of other female Ford employees and Milissa McClements. We agree.

Unlike the evidentiary issue presented relative to Bennett's conviction, the testimony of these other female employees and McClements does not present a close question regarding its admissibility. The testimony of other Ford employees as well as that of McClements is admissible to allow plaintiff to prove the existence of a hostile work environment. In *Radtke v Everett*, 442 Mich 368, 395 n 41; 501 NW2d 155 (1993), the Court held that an employer may be liable for a sexually hostile work environment created by its agent only if "the employer had actual or constructive knowledge of the existence of a sexually hostile working environment and took no prompt and adequate remedial action." In *Radtke, supra*, 442 Mich at 398, the Michigan Supreme Court noted:

> A hostile work environment claim is actionable only when, in the totality of the circumstances, the work environment is so tainted by harassment that a reasonable person would have understood that the defendant's conduct or communication had either the purpose or effect of substantially interfering with the plaintiff's employment, or subjecting the plaintiff to an intimidating, hostile, or offensive work environment. [*Id.* see also *Chambers v Trettco, Inc*, 463 Mich 297, 316; 614 NW2d 910 (2000) (holding that an employer can be vicariously liable for a hostile work environment only if it "failed to take prompt and adequate remedial action upon reasonable notice of the creation of a hostile work environment")].

In this case, plaintiff sought to introduce the testimony of other female Ford employees and Milissa McClements to establish that she was subjected to a hostile work environment at the Ford Wixom plant. Evidence that women other than plaintiff were subjected to a hostile work environment at the Ford Wixom plant is highly relevant under MRE 401 to show plaintiff's hostile environment claim. Moreover, the probative value of this evidence is not substantially outweighed by the danger of unfair prejudice to defendants or confusion of the issues. Specifically, evidence of the other acts of harassment is highly probative about whether defendant Ford should have known that Bennett was sexually harassing plaintiff. See generally, *Jackson v Quanex*, 191 F3d 647 (CA 6, 1999); *Hicks v Gates Rubber Co*, 833 F2d 1406 (CA 10, 1987).

We reject defendant Ford's contention that plaintiff sought to use the testimony of these other women for the purpose of proving that Bennett acted consistent with his character in sexually harassing plaintiff. Rather, we find that plaintiff sought to introduce the testimony of these other women to demonstrate Ford's liability under the doctrine of respondeat superior. In this regard, such testimony was clearly relevant to plaintiff's sexual harassment claim because plaintiff must show that Ford had notice of Bennett's sexual harassment under the "totality of the circumstances" known to Ford. See *Jackson, supra*, 191 F3d at 647. Even though we are not persuaded with defendant Ford's argument that the evidence is being submitted for the improper purpose of demonstrating Bennett's character under MRE 404(a), in the event plaintiff does make use of the evidence in such an improper manner, Ford can request that the trial court provide a limiting instruction regarding the testimony of these other women. We therefore reverse the decision of the trial court and hold that the testimony of the enumerated Ford employees and McClements is admissible for the reasons set forth in this opinion.

IV. Defendant Bennett

All parties agree that pursuant to this Court's ruling in *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464; 652 NW2d 503 (2002), defendant Bennett should be dismissed with prejudice from further proceedings in this matter. We thus direct the trial court to enter an order dismissing defendant Bennett with prejudice from this case.

V. Recusal

Plaintiff next contends that Judge Giovan should be recused because he had an "ongoing matter or relationship" with Kelvin Scott, an attorney with the firm representing defendant Ford. According to plaintiff, Judge Giovan never informed plaintiff's counsel that Scott was then the chair of his re-election campaign fundraiser that was taking place in the summer of 2002, when this case was set for trial before Judge Giovan. Plaintiff maintains that Judge Giovan's relationship with Scott created at least "the appearance of impropriety" because he has the affirmative duty, pursuant to the Michigan State Bar Ethics Committee, Opinion JI-079 (February 7, 1994) to disclose such a relationship to opposing counsel and all parties. Because we cannot find that an unethical relationship existed between Scott and Judge Giovan, no ethical violations were committed.

"When this Court reviews a motion to disqualify a judge, the trial court's findings of fact are reviewed for an abuse of discretion; however, the applicability of the facts to relevant law is reviewed de novo." *Armstrong v Ypsilanti Twp*, 248 Mich App 573, 596; 40 NW2d 321 (2001).

MCR 2.003(B) states, in relevant part:

> (B) Grounds. A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which:
>
> (1) The judge is personally biased or prejudiced for or against a party or attorney.
>
> ***
>
> (5) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding.

> Our Supreme Court has held that "judicial rulings alone almost never constitute valid basis for a bias or partiality motion. . . . In and of themselves (*i.e.*, apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved . . . . Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." [*Cain v Dep't of Corrections,* 451 Mich 470; 548 NW2d 210 (1996), quoting *Liteky v United States*, 510 US 540; 114 S Ct 1147, 1155, 127 L Ed 2d 474 (1994).]

We note that plaintiff waited to bring her motion for disqualification until Judge Giovan made his ruling on whether Bennett's conviction could be admitted into evidence. Similarly, plaintiff attempted to disqualify Judge MacDonald shortly after she made the same ruling. Such methodology lends credence to Judge Giovan's assertion that plaintiff merely awaits the trial court's ruling then brings a motion for disqualification. Additionally, plaintiff has failed to demonstrate that she brought her motion for disqualification within fourteen days of discovery of the alleged association between Scott and Judge Giovan. See MCR 2.003(C)(1).

Other than to point to rulings not of her liking, plaintiff has failed to point out to this Court any concrete factor of bias or prejudice on the part of the trial judge. The actions of plaintiff and her counsel demonstrate that while they were extremely upset, if not outraged by the rulings of the trial court, the record indicates that Judge Giovan treated this case and the litigants with respect and a great degree of tolerance. Because nothing in the record indicates that Judge Giovan acted with prejudice or impropriety, we are not persuaded that the trial court or the Deputy Chief Trial Judge abused their discretion by not disqualifying Judge Giovan from this matter. Accordingly, we remand this case back to Judge Giovan for rulings consistent with this opinion.

Affirmed in part, reversed in part and reversed and remanded in part. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Michael R. Smolenski

STATE OF MICHIGAN

COURT OF APPEALS

JUSTINE MALDONADO,

Plaintiff-Appellant,

v

FORD MOTOR COMPANY and DANIEL P. BENNETT,

Defendants-Appellees.

UNPUBLISHED
April 22, 2004

No. 243763
Wayne Circuit Court
LC No. 00-018619-NO

Before: Borrello, P.J., and White and Smolenski, JJ.

WHITE, J. (*concurring in part and dissenting in part*).

I agree that a circuit court has authority to impose sanctions for misconduct of a party or an attorney. Under the circumstances that no order was violated, no hearing was held regarding the motivations of plaintiff or plaintiff's counsel,[1] and no hearing was held to determine whether the jury pool was in fact tainted, I agree that the circuit court abused its discretion in dismissing the case.[2]

Because the public statements at issue occurred nearly two years ago, and the requisite record was not made when the case was dismissed, I would not direct that a hearing now be held on remand.

Regarding Bennett's conviction, I agree that it was not an abuse of discretion to exclude it on the basis that it was more prejudicial than probative, MRE 403. However, I do not come to

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[1] While the court did not make an express finding to this effect, it appears that the court found that the statements were intended to taint the jury pool. Plaintiff's and counsel's willfulness in publicizing the information is not tantamount to an intent to taint the jury. Plaintiff and her counsel apparently believed that plaintiff's experiences with Bennett, her case, and Bennett's asserted history were matters that should concern the public, and were worthy of publicity. While plaintiff and her counsel were clearly indifferent to the possibility of tainting the jury pool, it does not follow that this was their intent.

[2] I note that the court did not dismiss the case on the basis of counsel's statements to the press regarding the alleged bias of the Wayne County bench.

this conclusion in reliance on *Elezovic v Ford Motor Co*, 259 Mich App 187; 673 NW2d 776 (2003). While *Elezovic* involved the same alleged harasser and the same conviction, it was a different case with different facts. The conviction is not per se inadmissible, and its admissibility in each case involving Bennett should be assessed based on the facts and issues in that case. While the decision whether to admit the conviction is a matter of discretion on this record, rather than affirm the circuit court's exclusion of Bennett's conviction, I would direct that the matter be reassessed on remand, under the circumstance that both the probative value and the prejudicial impact must be reassessed in light of the additional evidence that will be admitted as a result of this Court's decision—testimony of other female Ford employees that the circuit court had previously excluded.

I agree that the court erred in excluding the testimony of the other female Ford employees and McClements. Plaintiff sought to introduce this testimony for several purposes: to establish that a hostile work environment existed at the Ford Wixom plant, to establish that plaintiff herself was subjected to a hostile work environment, and to establish respondeat superior, i.e., that Ford had or should have had notice of Bennett's sexual harassment, and that Ford failed to take prompt and adequate remedial action. Ford asserted lack of notice.[3]

In order to demonstrate a claim of hostile environment sexual harassment, an employee must prove that 1) the employee belonged to a protected group; 2) the employee was subjected to communication or conduct on the basis of sex; 3) the employee was subjected to unwelcome sexual conduct or communication; 4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and 5) respondeat superior. *Radtke v Everett,* 442 Mich 368, 382-383; 501 NW2d 155 (1993).

The testimony of the other women is admissible to show the existence of a hostile work environment at the Ford Wixom Plant, and was relevant to establish that plaintiff herself was subjected to a hostile environment by virtue of Bennett's conduct, as plaintiff testified and presented evidence that Bennett harassed her, and that she was aware of Bennett's harassment of several of the other women.

In addition, evidence of Bennett's alleged other acts of harassment was relevant toward establishing respondeat superior liability; his harassment of other women at the plant is probative of whether and to what extent defendant Ford had notice of Bennett's conduct and whether defendant failed to take prompt and adequate remedial action in the face of such notice. See *Chambers v Trettco, Inc,* 463 Mich 297, 316; 614 NW2d 910 (2000) (holding that an employer can be vicariously liable for a hostile work environment only if it "failed to take prompt and adequate remedial action upon reasonable notice of the creation of a hostile work environment.") Further, as the majority notes, the testimony of other female employees is probative of the totality of the circumstances surrounding Maldonado's claims, see *Chambers, supra* at 319 ("notice of sexual harassment is adequate if, by an objective standard, the totality of the

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[3] While it is unclear from Ford's appellate brief, it may contest further whether the alleged incidents actually happened.

circumstances were such that a reasonable employer would have been aware of a substantial probability that sexual harassment was occurring"), as it is to establish what exactly Ford knew about Bennett's propensities and conduct at the time that Maldonado complained of his harassment, and whether Ford took prompt and adequate remedial action.

I acknowledge that all of the testimony of the other workers may not be admissible as to each issue. On remand, the court should be free to sort this out and exclude specific testimony and give limiting instructions as necessary.

I join in parts IV and V of the majority opinion.

/s/ Helene N. White

STATE OF MICHIGAN

COURT OF APPEALS

126276

MILISSA MCCLEMENTS,

Plaintiff-Appellant,

V

FORD MOTOR COMPANY and DANIEL P. BENNETT,

Defendants-Appellees.

UNPUBLISHED
April 22, 2004

No. 243764
Oakland Circuit Court
LC No. 01-034444-CL

Before: Borrello, P.J., and White and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right from the August 2, 2002, opinion and order of Oakland Circuit Court granting defendants Ford Motor Company and Daniel P. Bennett's joint motion for summary disposition pursuant to MCR 2.116(C)(10) regarding plaintiff's claims of hostile work environment and sexual harassment under the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq.*, as to both defendants, and negligent retention of Bennett as to defendant Ford only. We reverse the trial court's dismissal of plaintiff's common law claim of negligent retention and affirm the trial court on all other matters presented.

On March 9, 1998, plaintiff began working as a cashier for AVI Food Systems (AVI), a contractor that operates the cafeterias at Ford's Wixom Assembly Plant (the Wixom Plant). AVI paid plaintiff's wages, provided her benefits, and established her hours.

In November 1998, defendant Bennett, then a superintendent in the Pre-Delivery Department at the Wixom Plant, chatted with plaintiff at her cashier station at the Wixom Plant Café on three or four occasions, asking her to meet him after work at a Taco Bell. Plaintiff alleges she declined Bennett's invitations. Thereafter, in late November 1998, Bennett allegedly entered the cafeteria when the cafeteria was closed, and came up from behind plaintiff and kissed her. According to plaintiff, she pushed Bennett away and attempted to keep on working. A few days later, Bennett again entered the cafeteria between break periods and attempted to kiss plaintiff, asking this time where they could go to have sex. When plaintiff said "no" to Bennett's request for sex, he allegedly replied, "you know you want it." Again, plaintiff pushed Bennett away and continued to work. Shortly thereafter, plaintiff changed cafeterias at the Wixom Plant to avoid seeing Bennett. Plaintiff did not complain to AVI or Ford about Bennett because she was afraid to risk her job and hoped to get a job with Ford. According to plaintiff, she only

mentioned that Bennett assaulted her to her union steward, Faith Marquis, and an hourly AVI co-worker.

On October 19, 1998, about six weeks before Bennett allegedly sexually assaulted plaintiff, Justine Maldonado, a Ford production worker at the plant, reported to her uncle, Joe Howard, a production manager at the Wixom Plant, and to her friend, David Ferris, who also worked at the plant, that Bennett had exposed himself, grabbed at her blouse, and otherwise sexually harassed her twice inside the plant and once when he followed her home from work. Maldonado went on to list a number of other sexually explicit acts committed by Bennett against her. A number of other female Ford employees came forward alleging that they too had been sexually harassed by Bennett.

On December 8, 1995, three years before Maldonado complained to Howard and Ferris about Bennett, Bennett was convicted of a misdemeanor offense of indecent exposure. Bennett's indecent exposure conviction arose from events occurring on August 23, 1995, when three high school girls reported to the police that they had observed a "white male masturbating while driving on S/B I-275."

On September 4, 2001, plaintiff filed suit in the Oakland Circuit Court, alleging claims of hostile work environment and sexual harassment as to both defendants Ford and Bennett and negligent retention as to defendant Ford.

Shortly after plaintiff filed suit, Bennett brought a motion to strike reference to his conviction for indecent exposure because the conviction had been expunged. Following a hearing, the trial court issued an opinion and order granting defendant Bennett's motion to strike portions of the complaint that made reference to the expunged conviction and directing plaintiff to file an amended complaint. However, the trial court noted that "at this time, the Court has not ruled that the Plaintiff is precluded from introducing into evidence information regarding that conviction since that issue is not before the Court." As to defendants' joint request that plaintiff be ordered not to make reference to the underlying facts of Bennett's expunged conviction in any future pleadings, the trial court further ruled that while it was "too burdensome to amend every pleading filed in this case," plaintiff's "future pleadings may not refer to the 1995 conviction."

Thereafter, defendants brought a joint motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) regarding plaintiff's claims of hostile work environment, sexual harassment as to both defendants, and her negligent retention claim as to defendant Ford. In an opinion and order entered on August 2, 2002, the trial court denied defendants' motion under MCR 2.116(C)(8), but granted their motion under MCR 2.116(C)(10).

Plaintiff argues that the trial court erred in granting summary disposition to defendant Ford on plaintiff's claim that Ford negligently retained Bennett in his position as superintendent. Plaintiff asserts there was evidence that Ford knew that Bennett had a propensity to sexually assault women, and thus the trial court erred in not submitting the issue to the jury. We agree.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition of all or part of a claim or defense may be granted when:

> [E]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. [MCR 2.116(C)(10).]

A motion under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998); *Mino v Clio School Dist*, 255 Mich App 60, 67; 661 NW2d 586 (2003), lv den 469 Mich 897 (2003). A motion under MCR 2.116(C)(10) must be supported by documentary evidence. MCR 2.116(G)(3)(b); *Meyer v City of Center Line*, 242 Mich App 560, 574; 619 NW2d 182 (2000). We conclude that plaintiff has presented genuine issues of material fact regarding her claim of common-law negligent retention.

Our Supreme Court announced the common law doctrine of negligent retention in *Hersh v Hentfield Builders, Inc*, 385 Mich 410; 189 NW2d 286 (1971). In *Hersh*, the Court stated, "'An employer who knew or should have known of his employee's propensities and criminal record before commission of an intentional tort by employee upon customer who came to employer's place of business would be liable for damages to such customer.'" *Id.* at 412, quoting *Bradley v Stevens*, 329 Mich 556, headnote 2; 46 NW2d 382 (1951). The Court reached its conclusion in reliance on 34 ALR2d 390 § 9, which states:

> As has already been noted, a duty imposed upon an employer who invites the general public to his premises, and whose employees are brought into contact with the members of such public in the course of the master's business, is that of exercising reasonable care for the safety of his customers, patrons, or other invitees. It has been held that in fulfilling such duty, an employer must use due care to avoid the selection or retention of an employee whom he knows or should know is a person unworthy, by habits, temperament, or nature, to deal with the persons invited to the premises by the employer. The employer's knowledge of past acts of impropriety, violence, or disorder on the part of the employee is generally considered sufficient to forewarn the employer who selects or retains such employee in his service that he may eventually commit an assault, although not every infirmity of character, such, for example, as dishonesty or querulousness, will lead to such result.

Therefore, our Supreme Court in *Hersh, supra,* asks the courts to look at the employer's knowledge of "past acts of impropriety" . . . . when ascertaining whether such a cause of action exists. In this case, plaintiff put forth evidence that Bennett had a criminal record for indecent exposure, and furthermore, that a number of Ford employees came forward with claims of Bennett sexually harassing them. It was therefore a question for the jury to determine, after examining all the evidence, whether Ford knew or should have known of Bennett's sexually derogatory behavior toward female employees. Whether Ford had knowledge of Bennett's propensities based on Maldonado's complaints was a question of fact. Further, we find a genuine issue of fact regarding whether Ford negligently retained Bennett as a supervisor.

The trial court ruled that even if other female Ford employees reported Bennett's sexual assaults, the reporting of those incidents did not "meet the qualifications" of a "high management official" as set forth in *Sheridan v Forest Hills Public Schools*, 247 Mich App 611; 637 NW2d 536 (2001). We find the court's analysis misplaced. There is no authority to support that the

notice requirements held applicable in hostile environment sexual harassment cases in *Sheridan, supra*, apply to common law negligent retention claims. However, even if we were to agree with the trial court that *Sheridan* is applicable, there was testimony indicating that Maldonado's complaints were referred to higher management authorities. Additionally, we find that whether Ford had knowledge of female employees who complained of Bennett's behavior was a question of fact. We therefore reverse the decision of the trial court and reinstate plaintiff's claim of common-law negligent retention.

Plaintiff next contends that the trial court erred in dismissing plaintiff's CRA claim against Ford because she is an individual who was subjected to discrimination by Ford, despite the fact that she was not a Ford employee. We disagree.

In *Elezovic v Ford Motor Co*, 259 Mich App 197, 192; 673 NW2d 776 (2003), this Court stated:

> The CRA prohibits an employer from discriminating because of sex, which includes sexual harassment. MCL 37.2202(1); MCL 37.2103(i); *Chambers v Trettco*, 463 Mich 297, 309; 614 NW2d 910 (2000); *Chambers v Trettco, Inc (On Remand)*, 244 Mich App 614, 617; 624 NW2d 543 (2001). MCL 37.2103(i) provides:
>
> "Discrimination because of sex includes sexual harassment. Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
>
> (i) Submission to the conduct or communication is made a term or condition either explicitly or implicitly to obtain employment. . . .
>
> (ii) Submission to or rejection of the conduct or communication by an individual is used as a factor in decisions affecting the individual's employment. . . .
>
> (iii) The conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive employment . . . environment."
>
> When sexual harassment falls under one of the first two subsections, it is commonly referred to as quid pro quo harassment; when it falls under the third subsection, it is commonly labeled hostile environment harassment. *Chambers, supra*, 463 Mich 310.
>
> To establish a claim of hostile environment harassment, an employee must prove the following elements by a preponderance of the evidence:
>
> (1) the employee belonged to a protected group;

(2) the employee was subjected to communication or conduct on the basis of sex;

(3) the employee was subjected to unwelcome sexual conduct or communication;

(4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and

(5) respondeat superior." [*Id.* at 311, quoting *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993).]

To determine whether defendant Ford is plaintiff's employer for purposes of her CRA claim, this Court applies the "economic reality" test. *Ashker v Ford Motor Co*, 245 Mich App 9, 14; 627 NW2d 1 (2001); *Seabrook v Michigan Nat'l Corp*, 206 Mich App 314; 520 NW2d 650 (1994); *McCarthy v State Farm Ins Co*, 170 Mich App 451, 455; 428 NW2d 692 (1988). As stated in *McCarthy, supra,* 170 Mich App at 455:

> The economic reality test looks to the totality of the circumstances surrounding the performed work in relation to the statutory scheme under consideration. While control of the worker's duties is to be considered under the economic reality test, other equally important factors include payment of wages, authority to hire and fire, and the responsibility for the maintenance of discipline. [Citations omitted.]

Contrary to plaintiff's claim, there was no genuine issue of material fact that plaintiff was Ford's employee. In this case, the trial court dismissed plaintiff's CRA claim, stating:

> The Court finds in this case there is no question of fact that the Plaintiff is employed by AVI Food Systems, not Defendant Ford. Thus, because only an employer is subject to liability under the Act, Defendant Ford cannot be liable.

Plaintiff testified that she was hired by AVI on March 9, 1998, that AVI issued her paychecks, that she was covered by a collective bargaining agreement negotiated between AVI and AFL-CIO Local 1064, and that AVI's managers determined which shift she would work and disciplined her. Thus, the trial court did not err in granting summary disposition to defendant Ford on plaintiff's CRA claim because Ford was not plaintiff's employer. We therefore affirm the trial court's order dismissing plaintiff's civil rights action. Having found that Ford is not plaintiff's employer for purposes of her CRA claim, we need not address plaintiff's contention that the trial court erred in granting summary judgment to defendant because Ford ignored notices that Bennett was sexually harassing women.

Plaintiff also alleges that the trial court erred in striking the facts surrounding Bennett's misdemeanor conviction for indecent exposure from plaintiff's complaint because they are part of the totality of the circumstances demonstrating the notice that Ford had of the danger of sexual

harassment posed by Bennett. We disagree. This Court reviews a motion to strike a pleading for an abuse of discretion. *Belle Isle Grille Corp v Detroit*, 256 Mich App 463, 469; 666 NW2d 271 (2003).

In granting defendant Bennett's motion to strike, the trial court ruled, in pertinent part:

> The Court further finds, pursuant to MCL 780.622(1), because an Order has been entered setting aside his conviction, Defendant Bennett is considered not to have been convicted of the offense of indecent exposure.
>
> Finally, the Court finds that the conviction is not relevant to either the Plaintiff's negligent retention or sexual harassment claim. In order for an employer to be subject to liability for sexual harassment, the Plaintiff must show notice of an offensive working environment. Again, Bennett's conviction was the result of behavior which occurred outside of the workplace. Thus that particular behavior could not have caused or have been notice of an offensive working environment.
>
> Finally [sic], the Court finds, based on the fact that Defendant Bennett's conviction has been set aside, that it is not proper for the Plaintiff to include information about his conviction in her Complaint. This does not necessarily preclude the Plaintiff from pursuing her claim of negligent retention. Furthermore, at this time, the Court has not ruled that the Plaintiff is precluded from introducing into evidence information regarding that conviction since that issue is not before the Court.

Pursuant to MCR 2.115(B), "On motion by a party or on the court's own initiative, the court may strike from a pleading redundant, immaterial, impertinent, scandalous, or indecent matter, or strike all or part of a pleading not drawn in conformity with these rules."

As the trial court noted, pursuant to MCL 780.622(1), on entry of the November 9, 2001, order setting aside the conviction, Bennett, "for purposes of the law, shall be considered not to have been previously convicted." Further, while the expunged conviction was removed from the public record under MCL 780.623, it was accessible as a non-public record to a limited class of individuals for certain public purposes not present in this case. Moreover, MCL 780.623(5) provides:

> Except as provided in subsection (2), a person, other than the applicant, who knows or should have known that a conviction was set aside under this section and who divulges, uses, or publishes information concerning a conviction set aside under this section is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $500.00, or both.

Under these circumstances, the trial court did not abuse its discretion in granting defendant Bennett's motion to strike references in plaintiff's complaint to his expunged conviction.

As both defendants correctly point out, the trial court made clear that it was not ruling on the admissibility or exclusion of the facts or evidence underlying Bennett's conviction. Indeed, as defendant Ford notes, the trial court allowed plaintiff to include facts about Bennett's conviction in her response to defendants' joint motion for summary disposition.

Last, plaintiff argues that defendant Bennett should not have been dismissed from this case. However, all parties now agree that pursuant to this Court's opinion in *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464, 478, 485; 652 NW2d 503 (2002), defendant Bennett should be dismissed from the case with prejudice.

Affirmed in part, reversed and remanded in part. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Helene N. White
/s/ Michael R. Smolenski

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

PAMELA PEREZ

Plaintiff,

Case No. 01-134649 CL
Hon. Robert L. Ziolkowski

vs.

FORD MOTOR COMPANY and
DANIEL P. BENNETT, Jointly and Severally
_____/

OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

Plaintiff filed this complaint against Defendants for violation of the Elliot Larsen Civil Rights Act on the theory of sexual harassment - sexually hostile work environment. Defendants bring this Motion for Summary Disposition pursuant to MCR 2.116 (C)(8) and (C)(10). Defendants argue that Defendant Bennett cannot be held personally liable for a violation of the Elliot-Larsen Civil Rights Act under current law. Indeed, all parties agree that, pursuant to Jager v. Nationwide Truck Brokers, Inc., 252 MichApp 464 (2002), he cannot be found individually liable and Defendant Daniel Bennett is hereby DISMISSED.

Defendant Ford Motor claims that it had no notice of the sexually hostile activity of Plaintiff's fellow employee, Bennett, and therefore cannot be liable.

Historically, Plaintiff began work with Ford Motor as an hourly UAW employee in 1990. As a term and condition of employment, Plaintiff knew she could report sexually

hostile behavior to the Wixom Plant labor relations department or to a UAW committee person. In 1995, Plaintiff did report unrelated conduct and involved both labor relations and the UAW to resolve the problem.

In the summer of 1999, Plaintiff claims Bennett offered her money to buy lingerie to model for him. Plaintiff believed it was only a joke and disregarded it. Later, Plaintiff claims Bennett made a remark about meeting after work. Again, Plaintiff felt it was a joke. However, in August of 1999, Plaintiff claims that, while in Bennett's office, he offered her money for a motel room and exposed himself to her. Plaintiff called Bennett an "asshole" and left. Plaintiff admits she did not report the incident.

On June 28, 2001 while testifying at a deposition as a witness in *Maldonado v Ford*, a related case involving Bennett and allegations of a sexually hostile environment, Plaintiff first reported the above incidents to a Ford Motor attorney. Ford attempted to further interview Plaintiff but she refused. On October 10, 2001, Plaintiff filed the instant action.

Ford moves pursuant to MCR 2.116 (C)(8) claiming that Plaintiff's complaint is clearly unenforceable as a matter of law and that no factual development could justify recovery because by her own admission, Plaintiff failed to notify Ford of the sexual activity. Maiden v. Rosewood, 461 Mich 109 (1999)

Ford also argues, pursuant to MCR 2.116 (C)(10), that there is no genuine issue of material fact and as a matter of law Plaintiff's claim must be dismissed pursuant to Radtke v. Everett, 442 Mich 368 (1992), since the evidence viewed in the light most favorable to the Plaintiff shows that she did not report the incidents and Ford had no notice, either actual or constructive.

Plaintiff claims a hostile work environment under the Elliot-Larsen Civil Rights Act, MCL 37.2102 and 37.2202. To establish this claim, Plaintiff must prove that: 1) she belonged to a protected group; 2) she was subjected to communication or conduct on the basis of sex; 3) she was subjected to unwelcome sexual conduct or communication; 4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with her employment or created an intimidating or hostile or offensive work environment; and 5) respondeat superior. Radtke, supra at 382-383; Chambers v. Trettco, Inc, 463 Mich 297, 311 (2000)

This motion rests on the issue of respondeat superior. The Court must consider the extent of the employer's vicarious liability when harassment is committed by an agent. In cases of vicarious liability involving hostile work environment claims, a Plaintiff must show some fault on the part of the employer. Where the claim is for hostile work environment, the violation of the Elliot-Larsen Civil Rights Act can only be attributed to the employer if the employer failed to take prompt and adequate remedial action after having been reasonably put on notice of the harassment. MCLA 37.2103 (i)(iii). Notice may be actual or constructive. For notice to be actual, Plaintiff must show she complained to higher management concerning the harassment. Sheridan v. Forest Hills Public Schools, 247 Mich App 611 (2001). For constructive knowledge, Plaintiff must demonstrate that the harassment was so pervasive that the employer's knowledge that Plaintiff's work environment was sexually hostile may be inferred. Notice of sexual harassment in an action for hostile work environment is adequate if, by an objective standard, the totality of the circumstances were such that a reasonable employer would have been aware of a substantial probability that sexual harassment was occurring.

MCLA 37.2103 (i)(iii)

In the case at bar, Plaintiff admits she did not report the incidents and therefore she failed to satisfy the requirement of actual knowledge of the employer. The question remains whether Ford had constructive knowledge of Plaintiff's hostile work environment.

Plaintiff contends that sexual harassment, as perpetrated by Bennett, was so pervasive at the Wixom plant that Ford had constructive notice and yet did not attempt any corrective measures. The Plaintiff provides the following chronology of events to support constructive notice.

On August 23, 1995 , Bennett was charged with indecent exposure while driving a Ford demonstrator vehicle. Ford knew of this and took no action. Bennett pled no contest and the matter has now been expunged.

In October, 1998, Justine Maldonado, an employee at Wixom, reported to Joe Howard, a production manager at Wixom that Bennett had sexually harassed her and exposed himself. Late in 1998, she told David Ferris, who was on temporary assignment in Labor Relations. Ferris told Jerome Rush, director of Labor Relations at Wixom. Rush did nothing. In June, 1999, Maldonado reported the incident to her UAW committeeman, Bill McKeever. McKeever spoke with Howard and Bennett and nothing was done.

Defendant argues this was not sufficient to put Ford on notice since none of the persons to whom the incidents were reported were persons in higher management as required by Sheridan. However, there is a question of fact concerning Rush and the UAW representative who do appear to be higher management. Defendant addresses

concern about the authority of Howard and Ferris but does not address the management position or appropriateness of reporting to Rush. Although Plaintiff did not directly tell Rush, it appears Rush was advised and there seems to be nothing to suggest that a third party report on behalf of the victim is insufficient. Also, the report to the UAW representative seems appropriate.

In January 1999, Lula Elezovic complained to Howard at the Wixom plant concerning sexual harassment by Bennett. Elezovic claims the activity began in 1995. Maldonado also reported Elezovic's complaints to Howard and Ferris in April and June, 1999. Ford took no action. Ford argues the Elezovic notice was insufficient. Judge Kathleen Macdonald in the *Elezovic* case in the Third Circuit Court ruled that the notice was insufficient and dismissed Elezovic's suit.

Plaintiff offers other explanations as to why she didn't report the incident. She didn't want her husband to find out for fear of his retaliation. She didn't think it would do any good and she would be retaliated against. Shortly after the incident, she went off work for over a year because of an injury on the job. Finally, Plaintiff provides an affidavit from a psychologist who opined that there was a high level of tolerance for abuse at the Wixom plant and that abusers were unlikely to be disciplined.

Plaintiff, in June 2001, found out about other complaints of sexual harassment and Bennett's alleged exposure in 1995 and decided to testify in the *Maldonado* case.

Plaintiff argues that Bennett was a serial harasser at the Wixon plant by virtue of the above actions which Ford was aware of and yet took no action, thus creating or acquiescing in the sexually hostile environment. Therefore, Ford had constructive notice of the Plaintiff's sexually hostile work environment.

Defendant Ford argues that the prior incidents referred to by Plaintiff are insufficient to establish constructive notice of Plaintiff's alleged sexually hostile environment. Assuming that the incidents referred to by Plaintiff were known by or reported to higher management, they do not provide notice of Plaintiff's condition.

Both parties reference Chambers v Trettco, Inc, 463 Mich 297 (2000), in support of their respective arguments. Plaintiff cites the Court to the language at page 319 where the Court stated that notice of sexual harassment is adequate if, by an objective standard, the totality of the circumstances were such that a reasonable employer would have been aware that sexual harassment was occurring. In making that determination, the Court is to rely on common law agency principles in determining when an employer is liable for sexual harassment committed by its employees. Chambers at 311. Plaintiff then cites Hersh v Kentfield Builders, Inc, 385 Mich 410 (1971), for the proposition that, under Michigan common law, an employer's knowledge of past acts of impropriety or violence on the part of an employee is generally considered sufficient knowledge to forewarn the employer.

However, the Chambers Court stated that it is illogical to impose strict liability on an employer in a pure hostile environment setting because, generally, in such a case, the supervisor acts outside the scope of actual or apparent authority to hire, fire, discipline or promote. Chambers at 311. Therefore, in cases involving a hostile work environment claim, a plaintiff must show some fault on the part of the employer, that is, that the employer failed to take prompt and adequate remedial action upon notice of the creation of the hostile work environment. This Court further adopts the analysis of the common law agency question as submitted by Defendant in its Supplemental Brief

Addressing the Inapplicability of Hersh v Kentfield Builders, Inc.

Furthermore, in Sheridan v Forest Hills Public Schools, 247 Mich App 611 (2001), lv den, 466 Mich 888 (2002), where the plaintiff complained to non-supervisory personnel and the Defendant had knowledge of a prior substantiated complaint of sexual harassment and a prior generalized complaint by plaintiff that she was being bothered, the Court held that there was insufficient notice to provide a basis for the employer to conclude that sexual harassment relating to the plaintiff was occurring. The Court in Sheridan, citing McCarthy v State Farm Ins Co, 170 Mich App 451 (1988), adopted that Court's definition of actual or constructive knowledge: "Where the plaintiff seeks to hold the employer responsible for the hostile environment created by plaintiff's supervisor or co-worker, she must show that the employer knew or should have known of the harassment in question and failed to take prompt remedial action." McCarthy, supra, 170 Mich App at 157, quoting Henson v City of Dundee, 682 F2d 897, 905 (CA 11, 1982).

Therefore, this Court finds that there is no question of material fact that Defendant did not have notice, either actual or constructive, of Plaintiff's alleged sexually hostile work environment as required to impose liability on the employer under the Elliot-Larsen Civil Rights Act. Radtke v Everett, 442 Mich 368 (1993); Chambers v Trettco, Inc, 463 Mich 297 (2000).

Wherefore, **IT IS ORDERED** that Defendant's Motion for Summary Disposition is **GRANTED.**

IT IS FURTHER ORDERED that this case is **DISMISSED;** this Order resolves

the last pending claim and closes the case.

JUN 23 2003

ROBERT L. ZIOLKOWSKI

CIRCUIT COURT JUDGE